No. _____

05-630 NOV 14 2005

In The

Supreme Court of the United States

LAWRENCE WEST, JR. and RENN WEST,

Petitioners,

vs.

DYNCORP, a Virginia Corporation, NATIONAL FLIGHT SERVICES, INC., a Florida Corporation, NATIONAL FLIGHT SERVICES, INC., an Ohio Corporation, MARTIN BAKER AIRCRAFT COMPANY, WEBER AIRCRAFT, INC., a foreign corporation, and DOES 1 through 10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a district court violate the Seventh Amendment right to a jury trial by resolving disputed issues of material fact during a pre-trial evidentiary hearing without a jury over the objection of the plaintiffs and then subsequently label the proceeding a bifurcated bench trial over plaintiffs' objection?

2. Can the common law created Borrowed Servant Doctrine be applied to the exclusive remedy provision of the Defense Base Act codified at 42 U.S.C. § 1651(c) where the alleged borrowing employer does not directly supervise the borrowed employee?

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a-4a) is unreported. The district court's opinions (App. 6a-19a) are also unreported.

JURISDICTION

The district court had jurisdiction over the underlying action pursuant to 28 U.S.C. § 1332 because the citizenship of the parties was diverse. On August 3, 2004, the United States District Court for the Middle District of Florida granted DynCorp's motion for entry of final judgment. (App. 19a). The district court formally entered final judgment in favor of DynCorp on August 4, 2004. (App. 20a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review the district court's final order and order of partial judgment delivered from the bench on April 21, 2004.

On August 31, 2004, the Wests filed and served their notice of appeal. The appeal filed within thirty days from the district court's entry of final judgment was timely pursuant to F. R. App. 4(a)(4)(v). On August 15, 2005, the Circuit Court of Appeals issued an opinion affirming the district court and thereafter entered judgment on September 13, 2005. (App. 21a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The important federal issues presented in this case stem from the lower courts' denial of plaintiffs' right to a

jury trial afforded by the U.S. Constitution Seventh Amendment to the United States Constitution. The district court's action in transforming a pre-trial evidentiary hearing into a bifurcated bench trial, despite plaintiffs' objections, also concerns Federal Rule of Civil Procedure 42.

The Seventh Amendment provides, "in suits at common law, when the value of controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

The lower courts also erred by rejecting the direct supervisory control standard of the Borrowed Servant Doctrine and adopting an ultimate contractual authority standard in determining whether the exclusive remedy provision of the Defense Base Act ("DBA") codified at 42 U.S.C. § 1651(c) barred the plaintiffs' claims. The Defense Base Act is an extension of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901 *et seq.*

Section 1651(c) reads as follows:

(c) Liability as exclusive

> The liability of an employer, contractor (or any subcontractor or subordinate subcontractor with respect to the contract of such contractor) under this chapter shall be exclusive and in place of all other liability of such employer, contractor, subcontractor, or subordinate contractor to his employees (and their dependents) coming within the purview of this chapter, under the workmen's compensation law of any State, Territory, or other jurisdiction, irrespective of the place where

the contract . hire of any such employee may have been m or entered into.

The district court and Eleventh Circuit Court of Appeals' rulings conflict with the rules of other circuit courts of appeals and depart from the accepted and usual course of judicial proceedings and call for an exercise of this Court's supervisory power.

STATEMENT OF THE CASE

Factual Background

This case arises from the February 6, 2000 crash of a Rockwell OV10-D aircraft in Larandia, Columbia, South America that seriously injured Lawrence West. At the time of the accident, Mr. West was flying a narcotics spray eradication mission on behalf of the Department of State, Bureau of International Narcotics and Law Enforcement Affairs ("DOS" and "INL"). (App. 5a, 38a-39a).

The DOS/INL aerial narcotics eradication program in Larandia, Columbia is carried out by the prime contractor, DynCorp. (App. 10a, 39a). DynCorp provides maintenance operations to the eradication aircraft and other contractual administrative duties. (App. 10a). As the prime contractor DynCorp owed ultimate responsibility to the Department of State and had authority over the execution of the prime contract directives. (App. 39a-49a).

DynCorp delegated duties under the prime contract to perform all aerial spray eradication missions to Eagle Aviation Services Technology, Inc. (EAST) through a subcontract. (App. 11a). Mr. West was a Line Pilot and contractual employee of EAST working in the DOS/INL program

at Larandia, Columbia pursuant to the subcontract. (App. 7a, 41a, 57a).

EAST maintained an office for the Chief Pilot at DynCorp headquarters at Patrick Air Force Base. (App. 41a-49a). EAST maintained an office for its Lead Standardization Pilot at DynCorp headquarters in Bogota, Columbia. (App. 41a-49a). EAST maintained an office for its Lead Pilot at DynCorp headquarters in Larandia, Columbia. (App. 41a-49a). DynCorp's president testified that "[t]he leads [EAST lead pilots] would in fact give daily direction as to where their employees would go, but the [DynCorp airbase] manager's overall in charge." (App. 43a). EAST exercised direct supervisory control over Mr. West. (App. 56a-61a).

District Court Proceedings

On March 23, 2004, the district court heard oral argument on DynCorp's motion for summary judgment alleging *inter alia* workers' compensation immunity under the exclusive remedy provision of the Defense Base Act through the application of the common law Borrowed Servant Doctrine. (App. 28a-35a). The parties agreed that Mr. West's status as DynCorp's borrowed servant was an issue for the district court to decide as a matter of law. (App. 30a). The district court determined genuine issues of material facts existed concerning Mr. West's borrowed servant status that precluded summary judgment on the record presented. (App. 7a-8a, 29a-30a).

At the March 23, 2004 hearing the district court stated "I'm inclined to think that maybe what we ought to do is to have a preliminary bench trial of some sort and get a complete record. . . ." (App. 30a). Plaintiffs objected to

this proposal and stated "my suggestion is that we rule as a matter of law today." (App. 31a). After a short recess the Court stated "[n]ow, on the worker's comp issue, we did take a quick look at some cases. I think it's pretty clear that that is a question of law for the Court. And on that particular issue, I do think it would behoove us to have a pretrial evidentiary hearing." (App. 33a).

The docket reflects that on March 25, 2004 the district court made the following entry. [t]ake notice that a hearing on employer immunity defense under 42 U.S.C. § 1651 and 33 U.S.C. § 901 will be held at 1:30 p.m. on 4/24/04. (App. 25a). However, the docket entry entered on April 20, 2004 stated "BIFURCATED TRIAL ON EMPLOYEE IMMUNITY DEFENSE held on April 20, 2004." (App. 26a).

On April 20, 2004, the district court stated the parties were appearing for a "bifurcated bench trial on the worker's comp immunity defense raised by DynCorp." (App. 37a). After an inquiry from plaintiffs' counsel, the district court corrected itself and stated "[i]t's a bifurcated proceeding. If I used trial inappropriately, I'm sorry." (App. 38a). DynCorp attacked the credibility of plaintiffs' witness and the Wests objected to the relevancy of this line of questioning due to the fact that credibility determinations were not appropriate during pre-trial evidentiary hearings. (App. 55a-56a).

The following day, the district court advised "[w]e're here this morning for a continuation of the hearing regarding defendant's motion for summary judgment as it relates to the worker's comp immunity defense. . . ." (App. 63a). During oral argument, the Wests argued the district court could not make credibility determinations at a pre-trial

evidentiary hearing. (App. 64a). The district court stated the Borrowed Servant Doctrine was to be determined as a matter of law and that the court was free to assess the credibility of witnesses. (App. 67a).

After oral argument, the district court issued an oral order finding in favor of DynCorp and stated that the proceeding had been an evidentiary hearing (App. 65a); however, it rendered credibility determinations. (App. 67a). The district court discounted one of plaintiffs' witnesses' testimony in its entirety and resolved all disputed issues of fact. (App. 71a-72a).

The district court dismissed plaintiffs' tort claims because it determined Mr. West was DynCorp's borrowed servant and the exclusive remedy provision of the Defense Base Act ("DBA") codified at 42 U.S.C. § 1651(c) thereby conferred immunity to DynCorp. (App. 71a). The district court's decision was based on the fact that DynCorp was the prime contractor and had ultimate authority over EAST as the subcontractor and discounted plaintiffs' argument that direct supervisory control was the proper standard. (App. 65a-70a).

Proceedings On Appeal

On appeal the Wests argued that the district court had improperly usurped the role of the jury by deciding disputed issues of material fact on a summary judgment motion. The district court had repeatedly stated its intention to conduct an evidentiary hearing. Even at the hearing the district court corrected the docket entry noting the hearing as a bifurcated bench trial. The district court then decided the disputed issues as if the hearing were a bench trial. The appeal court ruled that the Wests waived their

right to a jury trial merely by participating in the evidentiary hearing/bench trial. The court also affirmed the district court's determination that West was DynCorp's borrowed servant and adopted the analysis of the district court.

REASONS FOR GRANTING THE PETITION

The lower courts violated the West's Seventh Amendment right to a jury trial. The Seventh Amendment afforded the Wests the right to have a jury decide disputed issues of material fact based on the existence of an employment relationship and the right to control an employee. *See Kelley v. Southern Pacific Co.*, 419 U.S. 318, 331, 95 S.Ct. 472, 480, 42 L.Ed.2d 498 (1974); *Brown v. Union Oil Company of California*, 984 F.2d 674, 679 (5th Cir. 1993); *Gaudet v. Exxon Corporation*, 562 F.2d 351, 358 (5th Cir. 1977); *Kiff v. Traveler's Ins. Co.*, 402 F.2d 129, 131 (5th Cir. 1968).

Federal Rule of Civil Procedure 42(b) permits a district court to order the separate trial of any separate issue while "always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution." *See State of Alabama v. Blue Bird Cody Co.*, 573 F.2d 309, 318 (11th Cir. 1978).

The Wests were unaware of the district court's intention to treat the proceeding as a bifurcated bench trial given the numerous references to an evidentiary hearing. The district court even corrected itself when it mistakenly announced the parties were present for a bifurcated bench trial. To suggest that the plaintiffs waived their right to a jury trial defies the record and amounts to a violation of

their Seventh Amendment Right and a deviation from standard civil procedure by allowing a district court to enforce its will on a party by changing the nature of a proceeding.

The Eleventh Circuit Court of Appeals ruled that West waived a jury trial because it believed "West's counsel participated in the ensuing fact-finding proceeding without objection." (App. 3a). However, West objected to the labeling of the proceeding as a bifurcated bench trial at the beginning of the proceeding and at the end. (App. 37a, 55a-56a, 64a). The district court honored West's first objection and then overruled West's second objection. (App. 37a, 55a-56a, 64a). By that time, West had already participated in the proceeding. There was no waiver, but rather the district court imposed its will to dispose of the case without the benefit of a jury.

The district court's application of the Borrowed Servant Doctrine and the Eleventh Circuit's acceptance of the court's methodology create a conflict with the Fourth and Fifth Circuit Court of Appeals' requirement of a direct supervisory role into establish borrowed servant status in cases involving the Longshore and Harbor Worker's Compensation Act 33 U.S.C. § 901 *et seq.*; *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000), and *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986). The district court's application of the Borrowed Servant Doctrine also conflicts with this Court's requirement of a direct supervisory role to establish borrowed servant status in cases governed by the Federal Employer's Liability Act, 45 U.S.C.A. § 51 *et seq.*; *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 95 S.Ct. 472, 42 L.Ed.2d 498 (1974); *see also Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344 (3rd Cir. 1991) (requiring direct supervisory control).

The lower courts' application of the Borrowed Servant Doctrine conflicts with the cited cases because the lower courts adopted an analysis focusing on the ultimate authority of the prime contractor instead of the direct supervisory control of the alleged borrowed employee. The precedent now established in the Eleventh Circuit is that any prime contractor or general contractor by virtue of its contractual superiority over a subcontractor subsumes the latter's employees as its own for purposes of worker's compensation immunity.

This case presented a situation where the two companies at issue were sufficiently distinct in organization and responsibility and there was no apparent overlap in supervisory ranks. EAST maintained its own office at every level of the DynCorp hierarchy and was the sole source of direct control of the day-to-day activities of Mr. West. The court's acceptance of the ultimate contractual authority analysis marks a conflict in the law of the Borrowed Servant Doctrine that should be settled by this Court.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-14536

D.C. Docket No. 01-00146-CV-ORL-31-KRS

LAWRENCE E. WEST, JR.,
RENN WEST,

Plaintiffs-Appellants,

versus

DYNCORP,

Defendant-Appellee,

DYNAIR CFE SERVICES, INC.,
n.k.a. Swissport CFE, Inc., et. al.,

Defendants.

Appeal from the United States District Court
for the Middle District of Florida.

(August 15, 2005)

Before TJOFLAT, PRYOR and ALARCON*, Circuit Judges.

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* Honorable Arthur L. Alarcon, United States Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

In this case, appellee DynCorp had a contract with the U.S. State Department to eradicate coca plants in Columbia, S.A. The contract called for fixed wing pilots to fly aircraft and conduct aerial spraying missions.[1] DynCorp had no pilots to fly its aircraft, so it subcontracted with EAST to provide qualified fixed wing pilots. Appellant Lawrence E. West, Jr., was one of the pilots EAST provided. On February 6, 2000, an OV-10 aircraft West was piloting crashed near Larandia, Columbia. West survived the crash and brought this common law tort action against DynCorp (and others not before us) to recover compensatory and punitive damages.[2] His third amended complaint asserted the following personal injury claims against DynCorp: Count I, negligence, Count III, strict liability; Count IV, fraud and misrepresentation; Count V, willful, wanton, and reckless misconduct.

DynCorp's answer, in addition to denying that it had committed these torts, alleged that it was immune from suit under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq., because at the time of the crash, and the events leading up to it, West was functioning as DynCorp's borrowed servant. The parties agreed that whether West was a borrowed servant presented a question of law for the district court to decide.

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[1] As part of its contract responsibilities, DynCorp was responsible for overseeing the modification of a fleet of OV-10 aircraft, so that they could carry and spray herbicide, and providing support and maintenance services for the fleet.

[2] His wife joined him as a plaintiff. Since her recovery depends on the merits of West's claims, we refer only to West in this opinion.

DynCorp moved the court for summary judgment on the borrowed-servant issue, and the district court held oral argument on the motion. At the end of the hearing, the court denied the motion, concluding that material issues of fact remained to be litigated, and scheduled "[a] pretrial evidentiary hearing." On the scheduled hearing date, the court stated: "This hearing today was noticed as a bifurcated bench trial." West's counsel participated in the ensuing fact-finding proceedings without objection. A represented party forfeits his or her right to a jury trial by participating in a bifurcated bench trial without timely objection. *Southland Reship, Inc. v. Flegel*, 534 F.2d 639, 645 (5th Cir.1976).[3]

The bench trial took place on April 20 and 21, 2004. After hearing the evidence and resolving any factual disputes it presented, the court held that West was DynCorp's borrowed servant and that consistent with LHWCA's exclusivity provision, 33 U.S.C. § 905(a), West could not maintain his Count I and Count III claims against DynCorp. It then ordered the parties to brief the question of whether § 905(a) precluded West's Count IV and Count V claims.

In an order entered on August 3, 2004, the court concluded that the claims asserted in those counts "are unexceptional," and that such claims and the proof West offered to support them "do not suggest in any way that DynCorp acted or failed to act with a deliberate intent to injure" him. In other words, Counts IV and V were duplicitous of Counts I

[3] West's first two complaints demanded a jury trial; his third amended complaint did not. For purposes of this appeal, we treat West as having made a timely demand for a jury trial.

and III. After the court held that the "dual-capacity" doctrine did not apply in the context of this case, it gave DynCorp final judgment dismissing all of West's claims. West now appeals.

First, he contends that because he demanded a trial by jury, the district court erred in resolving the borrowed servant issue at a bench trial. We find no error. Our examination of the record leaves us with no doubt that West consented to the bench trial and thereby waived his Seventh Amendment right to have a jury decide the issues of fact involved in the application of the borrowed servant doctrine. Further, we find no error in the court's resolution of those issues of fact and its conclusion that West was a borrowed servant. Therefore, as the court properly held, § 905(a) foreclosed the negligence and strict liability claims asserted in Counts I and III.

We need not decide whether § 905(a) foreclosed West's Count IV and Count V claims because the allegations of those counts do not rise to the level of intentional tort. For this reason, the court properly dismissed them. Finally, we agree with the court's ruling that the dual capacity doctrine does not apply in this case.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LAWRENCE E. WEST, JR.
and RENN WEST,

Plaintiffs,

-vs-

Case No.
6:01-cv-146-Orl-31KRS

DYNCORP, a Virginia
Corporation,

Defendant.

ORDER

This case is before the Court on Defendant DynCorp's Motion for Summary Judgment (Doc. 175) and Plaintiff West's response thereto (Doc. 202). The Court held a hearing on this matter on March 23, 2004, during which the Court orally expressed its decision in light of the parties' submissions and oral arguments. The Court hereby memorializes and supplements its denial of DynCorp's Motion for Summary Judgment.

I. Background

On February 6, 2000, an OV-4 10D aircraft ("Aircraft") West was piloting crashed near Larandia, Colombia. That incident occurred during an International Narcotics Control Program ("INCP") which the U.S. Department of State sponsored, and for which DynCorp provided logistical and maintenance services, including support and maintenance of the Aircraft. In regard to the incident, West asserts claims against Dyncorp for injuries he alleges

he suffered because certain of the Aircraft's features were defectively designed and because DynCorp negligently maintained the Aircraft. DynCorp seeks summary judgment principally on three bases: (1) the government contractor defense, (2) the employer immunity defense under the Longshore and Harbor Worker's Compensation Act ("LHWCA"), and (3) a release West signed before performing INCP duties.

II. Findings and Analysis

A. Government Contractor Defense.

The government contractor defense provides that the U.S. government's sovereign immunity shields a contractor from liability in regard to equipment or services where (1) the United States approved reasonably precise specifications for the equipment or services; (2) the equipment or services conformed to those specifications; and (3) the contractor warned the United States about dangers in the use of the equipment or the service procedures that were known to the contractor but not to the United States. *See Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1335 (11th Cir. 2003). A contractor who asserts this defense must plead and prove it. *See Xudgens*, 328 F.3d at 1344-45.

In the instant case, the applicability of the government contractor defense is in considerable doubt. As to the design of the Aircraft's relevant features, the record in the instant case does not include sufficient evidence from which to determine the first prong of the government contractor defense; DynCorp did not produce government approved specifications for the Aircraft's relevant features.

As to the Aircraft's maintenance, the record further presents conflicting evidence on whether DynCorp followed required maintenance procedures. *(Compare* Doc. 164, *Ex.* 8 *with* Doc. 202, Exs. B and H). Accordingly, summary judgment on the government contractor defense is inappropriate.

B. Employer Immunity Under the LHWCA

According to the Defense Base Act, 42 U.S.C. § 1651(a)(4), the workers' compensation-type provisions of the LHCWA apply in respect to the injury or death of any employee engaged in certain government-contracted employment performed outside the United States. The LHCWA provides employer-immunity from liability exceeding an employee's statutory right to certain compensation and benefits. 33 U.S.C. § 933(i). Although the LHCWA purports to apply only to persons in an employer-employee relationship, *id.*, under the borrowed-servant doctrine, a person in a formal relationship with one employer may perform duties such that he or she may be considered, as a matter of law, the employee of a third-party with whom the person has no formal employer-employee relationship. *Canty v. A. Sottacchi, S.A. de Navegacion,* 849 F. Supp. 1552, 1556 (S.D. Fla. 1994).

In the instant case, the aircraft incident took place while West was acting in an employment situation covered by the Defense Base Act and, accordingly, the LHWCA. West, however, was not a formal employee of DynCorp, and DynCorp and West have introduced conflicting affidavits bearing on the issue of whether West may be considered DynCorp's employee under the borrowed-servant doctrine. *(Compare* Doc. 164, Ex.1 *with* Doc. 202, Ex. A.).

The conflicting evidence on the record precludes summary judgment on the borrowed-servant issue and, accordingly, on DynCorp's claim of employer immunity under the LHWCA.[1]

C. The Release West Signed Before Performing INCP Duties

Under Florida law, a pre-accident release is strictly construed against the party claiming to be released from liability. *Sunny Isles Marina, Inc. v. Adulami*, 706 So.2d 920, 922 (Fla. 3rd DCA 1998). To be enforceable, a release must be clear and unequivocal, such that an ordinary and knowledgeable party will know what potential claims are being contracted away. *Id.* (citation omitted).

In the instant case, the release upon which DynCorp relies includes the following language:

> The undersigned agrees that neither he nor his heirs will make, assert, or maintain against the U.S. Government, DynCorp or East, Inc., its officers, employees, agents or subcontractors amy [sic] claims, demand, action, suit or proceeding arising out of or in connection with his demonstration to the company and to the Slate Department, including but not limited to, his presence in the aircraft supplied by DynCorp under the INM contract.

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[1] Nevertheless, whether West is a borrowed-servant of DynCorp is an issue for the Court to decide as a matter of law. *See Canty*, 849 F. Supp. at 1556. A pre-trial evidentiary hearing has been set to aid in the Court's determination of this issue.

(Doc. 164, Ex. 22). The Court finds the foregoing language ambiguous and confusing, especially, the use of the term "demonstration," which is nonsensical in this context. West's claims against DynCorp concern the design and maintenance of the Aircraft. The release is not so clear and understandable as to inform an ordinary and knowledgeable party that such claims were being contracted away. *See Sunny Isles Marina*, 706 So.2d at 922. The release, therefore, does not entitle DynCorp to summary judgment.

III. Conclusion

For the foregoing reasons, and for reasons more fully stated during the March 23, 2004 hearing, it is hereby

ORDERED that Defendant DynCorp's Motion for Summary Judgment (Doc. 175) is **DENIED**.

DONE and **ORDERED** in Chambers, Orlando, Florida this 25 day of March, 2004.

/s/ Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

LAWRENCE E. WEST, JR. and RENN WEST,

Plaintiffs,

-vs-

Case No. 6:01-cv-146-Orl-31KRS

DYNCORP, a Virginia Corporation,

Defendant.

ORDER

This case is before the Court on Defendant DynCorp's Motion for Entry of Final Judgment (Doc. 248), Plaintiff West's Response (Doc. 254) thereto, and Dyncorp's Reply (Doc. 257).

I. Background

On February 6, 2000, a modified OV-10 aircraft West was piloting crashed near Larandia, Colombia. The crash occurred in the course of an International Narcotics Control Program ("INCP") sponsored in part by the U.S. Department of State ("Government"). DynCorp was the Government's prime contractor and was responsible for managing key aspects of the INCP operations. As part of its responsibilities, DynCorp provided logistical and maintenance services, including oversight of aircraft modifications as well as directly providing support and maintenance for a fleet of OV-10s, including the subject aircraft, modified to carry and spray herbicide to eradicate

coca plants. Dyncorp also subcontracted with Eagle Aviation Services and Technology, Inc., to obtain pilots, including West, to operate the OV-10s on coca plant eradication missions. Because of the crash, West has brought the instant tort action against Dyncorp.

On October 3, 2003, West filed a Third Amended Complaint (Doc. 115) which included the following personal injury claims against Dyncorp: (Count I) Negligence; (Count III) Strict Liability; (Count IV) Fraud and Misrepresentation; and (Count V) Willful, Wanton, and Reckless Misconduct. Dyncorp, in turn, filed an Answer and Affirmative Defenses, which included a defense of immunity under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* ("LHWCA").[1] Dyncorp later fleshed out this argument in a Motion for Summary Judgment (Doc. 175), asserting that Dyncorp was West's employer and, therefore, the LHWCA's "Exclusiveness of liability" provision, 33 U.S.C. § 905, barred West's tort action.

The Court denied Dyncorp's Motion for Summary Judgment on the following findings:

> In the instant case, the aircraft incident took place while West was acting in an employment situation covered by the Defense Base Act and, accordingly, the LHWCA. West, however, was not a formal employee of DynCorp, and DynCorp and West have introduced conflicting affidavits bearing on the issue of whether West may be considered DynCorp's employee under the borrowed-servant doctrine.

[1] The Defense Base Act, 42 U.S.C. § 1651 *et seq.*, which applies to West's claims in this case, incorporates by reference the LHWCA, with limited exceptions not relevant herein. For ease of reference, the Court cites the LHWCA as the law relevant to West's claims.

> (*Compare* Doc. 164, Ex.1 *with* Doc. 202, Ex. A.). The conflicting evidence on the record precludes summary judgment on the borrowed-servant issue and, accordingly, on DynCorp's claim of employer immunity under the LHWCA.

(Doc. 227). Yet based on the parties' representations at oral argument on the Motion, the Court set a bench trial on the borrowed-servant issue. That trial took place on April 20 and 21, 2004. (Docs. 237-38). At its close, the Court ruled orally that West was indeed Dyncorp's borrowed servant.[2] Consistent with the LHWCA's exclusivity provision, 33 U.S.C. § 905(a), the Court held that West could not maintain negligence and strict liability claims against Dyncorp, his *de facto* employer.[3] Nevertheless, as the parties had not briefed, nor had the Court considered, whether the ruling would also preclude West's claims of Fraud and Misrepresentation (Count IV) and Willful, Wanton, and Reckless Misconduct (Count V), the Court ordered further briefing on that issue.

Dyncorp thereafter filed its Motion for Entry of Final Judgment (Doc. 248). On the issue of whether all of West's claims against Dyncorp are barred by LHWCA exclusivity, Dyncorp asserts that the LHWCA precludes an employee from maintaining personal injury actions against his or

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[2] Trial transcripts are filed at (Doc. 242) for day 1 and at (Doc. 260) for day 2.

[3] In making this determination, the Court considered the nine-factor test enumerated in *Canty v. A. Bottacci, S.A. de Navegacion*, 849 F. Supp. 1552 (S.D. Fla. 1994), which, under the circumstances, supported the finding that West was Dyncorp's borrowed servant. This finding, of course, did not leave West without meaningful recourse because he has already applied for and received substantial benefits consistent with the provisions of the LHWCA.

her employer regardless of whether the employee asserts claims for negligence; gross negligence; willful, wanton and reckless misconduct; or intentional fraud. Dyncorp further asserts that, in any event, West has not presented a claim beyond the scope of LHWCA exclusivity.

West's Response (Doc. 254), primarily, is that LHWCA exclusivity does not extend to actions for intentional torts; those courts that have applied LHWCA exclusivity to intentional tort claims have inappropriately required proof of "specific intent" to kill or injure; the Eleventh Circuit has not addressed whether LHWCA exclusivity extends to intentional torts; and this Court should find that West has raised a triable issue as to whether Dyncorp deliberately acted to injure West. Furthermore, for the first time in this matter, West raises the so-called "dual-capacity" doctrine to argue that Dyncorp tortiously acted toward West in a capacity independent of their employer-employee relationship, so LHWCA exclusivity does not bar any of West's claims.

With reference to the record, West essentially alleges that the February 6, 2000 crash incident occurred not because of pilot error, but because of Dyncorp's deliberate misconduct in the design and maintenance of the crash aircraft. West contends that Dyncorp failed to install, according to approved designs, a feature on the aircraft that would have allowed it to dump its cargo approximately 15 seconds faster; Dyncorp was warned about and failed to remedy deficient compliance with maintenance procedures; Dyncorp mechanics did not follow the mandatory maintenance procedures and cleared West for the fated mission despite the fact that one of the aircraft's engines showed signs of excessive wear; and Dyncorp tolerated such lax procedures in order to maintain a level

of mission readiness that would qualify Dyncorp for contract bonuses. West also contends the above-referenced misconduct arose in Dyncorp's maintenance operations which he alleges are legally distinct from Dyncorp's piloting operations.

II. ANALYSIS

The LHWCA is a comprehensive federal legislative scheme that requires employers to provide coverage in the nature of workers' compensation for employees who are injured or killed in the course of certain employment. 33 U.S.C. § 901 *et seq.* More than simply a remedial statute for the benefit of injured workers, the LHWCA's was designed to create *a quid pro quo* whereby "[e]mployers relinquished their defenses to tort actions in exchange for limited and predictable liability," and "[e]mployees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. U.S. Dept. of Labor*, 461 U.S. 624, 636 (1983); *see also Houston v. Bechtel Assocs. Prof. Corp.*, 522 F. Supp. 1094, 1095 (D.D.C. 1981).

A. West's Injury is of a Type to Which LHWCA Exclusivity Applies.

The LHWCA provides, in part, that "the liability of an employer [under the LHWCA] shall be exclusive and in place of all other liability of such employer to the employee, . . . [and his] wife. . . ." 33 U.S.C. § 905(a). As the LHWCA provides its exclusive remedy in instances of employee "injury" – defined as "an accidental injury or death," *id.* § 902(2) – employees have made repeated attempts to circumvent LHWCA exclusivity through

characterizing their injuries as caused not by "accident" but by misconduct, variously described as gross, wanton, willful, deliberate, intentional, malicious, etc. *See, e.g., Johnson v. Odeco Oil and Gas Co.*, 864 F.2d 40, 44 (5th Cir. 1989); *Houston*, 522 F. Supp. at 1095-97; *Austin v. Johns-Manville Sales Corp.*, 508 F. Supp. 313, 316-17 (D. Me. 1981). Courts uniformly have rebuffed such attempts except to indicate that the LHWCA may or does not preclude claims for genuine intentional injury in the sense that an employer acted with an intent to harm or kill an employee. *See id.* None of these cited cases, however, and apparently no others construing the LHWCA, have ever accepted an employee's characterization of an employer's conduct as evincing such intent. *See id.* Rather, there is a consensus that an employer's knowing failure to correct hazardous work conditions, knowingly ordering employee's into harm's way, or willfully violating safety protocols is not evidence of intent that strips a resulting injury of accidental character. *See id.*

Viewed in comparison to the foregoing line of cases, West's claims are unexceptional. Although he argues that Dyncorp's conduct transcended the bounds of ordinary negligence, he has not made a principled attempt to distinguish his case from other failed attempts to circumvent LHWCA exclusivity. West's claims, and the proofs he offers, do not suggest in any way that Dyncorp acted or failed to act with a deliberate intent to injure West. Rather, at best, West has done nothing more than indicate that Dyncorp knowingly allowed or perpetuated certain conditions which any reasonable person would recognize as prone to result in injury. Such allegations and proofs fit within the bounds of negligence, albeit gross, but they do not describe an intentional tort. *See, e.g., Johnson*, 864

F.2d at 44. The Court sees no meaningful basis to distinguish, or compelling reason to depart from, the well-established line of cases finding LHWCA exclusivity despite claims that an injury was not accidental.

B. Dyncorp Did Not Commit the Alleged Misconduct in a Capacity Distinct From Dyncorp's Employment Relationship With West.

In *Jones & Laughlin Steel Corp. v. Pheifer*, 462 U.S. 523, 526 (1983), a longshoreman employed as a stevedore, or dockhand to load and unload ships, had brought a tort action against his employer after being injured by negligent maintenance aboard a vessel. The employer was not only engaged in stevedoring operations – normally performed independent of vessel operations – the employer also owned and operated the vessel. *Id.* at 526, 529. At issue was whether the employer could be held liable for remedies under the LHWCA as well as for additional liability in a tort action concerning the vessel. *Id.* at 525. The Court found that despite the LHWCA's exclusivity provision, § 905(a), "[t]he first sentence of § [90]5(b) authorizes a longshoreman whose injury is caused by the negligence of a vessel to bring a separate action against such a vessel as a third party." *Id.* at 530. In light of § 905(b)'s language and its legislative history, the Court held that the longshoreman's separate action was authorized. *Id.* at 530-32.

In the instant case, West cites *Pheifer* as a manifestation of the "dual-capacity" doctrine in the LHWCA context. On this theory, West argues that injuries arose only from the wrongful conduct of Dyncorp in its capacity as an aircraft maintenance provider; West's employment involved Dyncorp acting in an independent capacity as a

provider of piloting services; and thus, according to the dual-capacity doctrine, West can sue Dyncorp in its distinct capacity as a maintenance provider. In *Pheifer*, however, the Supreme Court found in the LHWCA specific statutory authorization as well as historical support for tort actions between an exact alignment of characters, stevedore verses vessel owner. *Id.* at 530-32. *Pheifer* is no broad manifestation of the "dual capacity" doctrine, nor does that doctrine provide a broad basis to circumvent LHWCA exclusivity. For the "dual-capacity" doctrine to apply, an employer-tortfeasor must have taken on the role of a completely separate legal entity, itself a stranger to the employer-employee relationship. *See Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1580 (11th Cir. 1998). This contemplates that an employer's tortious conduct occur in a situation where the employment relationship is a mere coincidence to the tort – no proximate causal relationship exists between the injury and the employee's duties in the employment relationship. *See Wright v. United States*, 717 F.2d 254, 258, 260 (6th Cir. 1983) (finding hospital's medical malpractice occurred in a capacity distinct from employment relationship when hospital treated its employee who presented with a ruptured tubal pregnancy); *Wilder v. United States*, 873 F.2d 285, 289 (11th Cir. 1989) (refusing to find dual-capacity liability where employer's medical malpractice aggravated a back injury an employee sustained in course of performing her employment duties).[4]

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[4] The Eleventh Circuit in *Wilder* criticized and refused to adopt the Sixth Circuit's reasoning in *Wright*, with the following observation: "Whatever the merits of the [dual-capacity] doctrine as a matter of workmen's compensation law generally, its application in this case would effectively circumvent the comprehensive scheme of federal

(Continued on following page)

The Court has difficulty viewing West's "dual-capacity" argument as anything other than a thinly-veiled attempt to challenge the Court's prior finding that West was Dyncorp's borrowed servant. West essentially seeks to drive a formalistic wedge between himself, as a pilot, and Dyncorp, as the Government's prime contractor for the INCP. A clear holding that may be gleaned from the Court's April 21, 2004, oral decision is that, in nearly all relevant respects, Dyncorp held a status as West's *de facto* employer within the context of the INCP, an integrated drug eradication operation. (*See* Doc. 260). Although, formally, Dyncorp, as the Government's prime contractor for the INCP, obtained West's labor through a subcontract, West took on the status of being Dyncorp's borrowed servant as a function of the level of control Dyncorp reserved over interrelated aspects of one specialized service Dyncorp contributed to the INCP. Regardless of the various aspects of that service, Dyncorp did not take on a legally distinct capacity from its status as the Government's prime contractor when West took on the status of being Dyncorp's borrowed servant; rather, West, in substance, ceased to be other than an employee of Dyncorp in its service to the INCP. There is a clear causal connection between Dyncorp's alleged negligence, West's injuries, and West's employment duties. No basis in law, logic, or policy compels a finding of dual-capacity liability in this instance.

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workmen's compensation established by Congress *via* statutes such as the LHWCA and the FECA." *Wilder*, 873 F.2d at 289.

III. Conclusion

For the foregoing reasons, and in light of the Court's findings and decision during the April 20 and 21, 2004, bench trial, it is hereby:

ORDERED that Dyncorp's Motion for Entry of Final Judgment (Doc. 248) is **GRANTED**, and West's Third Amended Complaint (Doc. 115) is **DISMISSED** with prejudice. Any other pending motions are denied as moot. The Clerk of the Court is directed to close the file in this case.

DONE and **ORDERED** in Chambers, Orlando, Florida this 3rd day of August, 2004.

/s/ Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LAWRENCE E. WEST, JR.
and RENN WEST,

Plaintiffs,

-vs-

Case No.
6:01-cv-146-Orl-31KRS

DYNCORP, a Virginia
Corporation,

Defendant.

JUDGMENT IN A CIVIL CASE

(Filed Aug. 4, 2004)

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Plaintiffs, Lawrence E. West, Jr. And Renn West take nothing on the claim against Defendant Dyn-Corp, and the action be dismissed.

Date: August 4, 2004

SHERYL L. LOESCH, CLERK

By: /s/ L. Vega
L. Vega, Deputy Clerk

United States Court of Appeals
For the Eleventh Circuit

No. 04-14536

District Court Docket No.
01-00146-CV-ORL-31-KRS

LAWRENCE E. WEST, JR.,
RENN WEST,

Plaintiffs-Appellants,

versus

DYNCORP,

Defendant-Appellee,

DYNAIR CFE SERVICES, INC.,
n.k.a. Swissport CFE, Inc., et al.,

Defendants

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

(Filed Aug. 15, 2005)

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 15, 2005
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:01-CV-146-ORL-31KRS

LAWRENCE E. WEST, JR. and
RENN WEST,

Plaintiffs

vs.

DYNCORP, a Virginia corporation, NATIONAL FLIGHT SERVICES, INC., a Florida corporation, NATIONAL FLIGHT SERVICES, INC., an Ohio corporation, MARTIN BAKER AIRCRAFT COMPANY, WEBER AIRCRAFT, INC., a foreign corporation, and DOES 1 through 10,

Defendants.
_____/

* * *

03/19/2004	219	MOTION by Lawrence E. West Jr., Renn West for leave to file a Sur-Reply to Plaintiffs' response to Dyncorp's Motion for Summary Judgment. (hsh) (Entered: 03/19/2004)
03/22/2004	220	ORDER: Granting [219-1] motion for leave to file a Sur-Reply to Plaintiffs' response to Dyncorp's Motion for Summary Judgment. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 03/22/2004)

03/23/2004	221	SUR-REPLY by Lawrence E. West Jr., Renn West to DYNCORP'S [213-1] Response. (hsh) (Entered: 03/25/2004)
03/24/2004	222	FINAL PRETRIAL CONFERENCE held on 3/24/04 before Judge Gregory A. Presnell. Court Reporter: Diane Peede. (hsh) (Entered: 03/25/2004)
03/24/2004	222	and MOTION HEARING held on 3/24/04; re: [206-1] motion In Limine, [205-1] motion In Limine to Exclude Reference to Prior Accidents, and/or Repair and Maintenance Problems and Dyncorp's Contract Bonuses, [175-1] motion for summary judgment before Judge Gregory A. Presnell. Court Reporter: Diane Peede. (hsh) (Entered: 03/25/2004)
03/25/2004	223	ORDER: The Court hereby grants Arthur Wold, Esquire, counsel for the Plaintiffs in this case, and John P. Falcone, Esquire, counsel for the Defendants in this case EACH permission to bring one cellular telephone and one laptop computer into the George C. Young U.S. Courthouse for use during the jury trial which commences on May 3, 2004 before the Honorable Gregory A. Presnell. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 03/25/2004)

03/25/2004	224	ORDER: The trial of this case shall commence at 9:00 a.m. on May 3, 2004. Set jury trial at 9:00 a.m. on 5/3/04; scheduled before Judge Gregory A. Presnell. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 03/25/2004)
03/25/2004	225	NOTICE OF HEARING: Take Notice that a Hearing is set at 9:00 a.m. on 4/21/04 on Plaintiffs [206-1] motion In Limine and other pretrial matters; Scheduled before Judge Gregory A. Presnell. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 03/25/2004)
03/25/2004	226	NOTICE OF HEARING: Take Notice that a hearing on employer immunity defense under 42 U.S.C. Sec. 1651 and 33 U.S.C. Sec. 901 will be held at 1:30 p.m. on 4/20/04; scheduled before Judge Gregory A. Presnell. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 03/25/2004)

* * *

04/13/2004	234	UNOPPOSED MOTION by Dyncorp to extend time until 4/19/04 to respond to Plaintiffs' supplemental motion in limine for an adverse inference and shifting of burden of proof (unopposed); referred to Magistrate Judge Karla R. Spaulding (jet) (Entered: 04/14/2004)

04/15/2004	235	ORDER granting [234-1] motion to extend time until 4/19/04 to respond to Plaintiffs' supplemental motion in limine for an adverse inference and shifting of burden of proof; response to motion set to 4/19/04 for [233-1] supplemental motion in limine (Signed by Gregory A. Presnell) ctc (jet) (Entered: 04/15/2004)
04/19/2004	236	RESPONSE by Dyncorp to [233-1] supplemental motion in limine for a spoliation adverse inference and shifting of burden of proof. (hsh) (Entered: 04/20/2004)
04/20/2004	237	BIFURCATED TRIAL ON EMPLOYEE IMMUNITY DEFENSE held on April 20, 2004 before Judge Gregory A. Presnell. Court Reporter: Tony Rolland. (hsh) (Entered: 04/21/2004)
04/21/2004	238	WORKERS COMPENSATION IMMUNITY DEFENSE (continued from 4/20/04) & PLAINTIFF'S MOTION IN LIMINE REGARDING SPOILATION [sic] ADVERSE INFERENCE & SHIFTING BURDEN OF PROOF held on April 21, 2004; re: [233-1] supplemental motion in limine for a spoliation adverse inference and shifting of burden of proof before Judge Gregory A. Presnell. Court Reporter: Victoria Ann Millonig (407/774-4343). (hsh) (Entered: 04/22/2004)

04/21/2004	239	EXHIBIT LIST by defendant Dyncorp (hsh) (Entered: 04/22/2004)
04/21/2004	240	EXHIBIT LIST by plaintiff Lawrence E. West Jr., plaintiff Renn West (hsh) (Entered: 04/22/2004)
04/21/2004	241	ORDER: It is ORDERED that this matter is removed from the May trial docket, and rescheduled for the trial docket commencing September 1, 2004. Rescheduled Jury Trial for the trial term beginning 9:00 a.m. on 9/1/04; scheduled for Judge Gregory A. Presnell. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 04/22/2004)
04/28/2004	242	TRANSCRIPT of hearing on motion held on April 20, 2004 before Judge Gregory A. Presnell. Transcript filed separately. (hsh) (Entered: 04/29/2004)
05/06/2004	243	ORDER: Denying as moot [233-1] supplemental motion in limine for a spoliation adverse inference and shifting of burden of proof. (Signed by Judge Gregory A. Presnell) ctc (hsh) (Entered: 05/07/2004)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case no.: 6:01-cv-146-Orl-31KRS

LAWRENCE E. WEST, JR., and RENN WEST, Plaintiffs, v. DYNCORP, a Virginia corporation, and NATIONAL FLIGHT SALES CORPORATION, an Ohio corporation, & DOES 1-7, Defendants.	Orlando, Florida March 23, 2004 1:32 p.m.

Transcript of motions hearing
before the Honorable Gregory A. Presnell
United States District Judge

Appearances:

For the Plaintiff:	Bradley Stoll Attorney at Law
For Defendant DynCorp:	John Falcone Thomas Scott, Jr. Attorneys at Law
Court Reporter:	Diane C. Peede, RMR, CRR United States Courthouse 80 North Hughey Avenue, #300 Orlando, Florida 32801 (407) 650-0055

* * *

[11] Scott.

MR. SCOTT: Judge, just one more point. We think this release not only goes to the question of the idea of the release, but also the affirmative defense of the assumption of the risk and can be viewed in that context as a factual issue on that particular defense, which goes beyond the release also.

THE COURT: I understand.

MR. STOLL: And the release would have to be effective to get to that point.

THE COURT: I understand. Okay. The next issue would be the issue of whether Mr. West's claim, at least in the order that I'm going to take it, is barred by the worker's comp immunity or the federal counterpart to that. Let me go ahead and hear brief argument on that. I don't think I need a lot.

MR. SCOTT: Do you want to hear from me, sir?

THE COURT: Whichever one of you two gentlemen is going to argue that.

MR. SCOTT: Okay. Judge, our brief lays out the defense of the workmen's compensation issue and whether or not it's considered to be a statutory bar under 9331 – I mean, the case law is sort of

* * *

[15] THE COURT: Well, I think it is fair to say, Mr. Scott, and I appreciate your candor with the Court, that there appear to be, based on the record before me, issues of fact in dispute that are material which would

bear on that issue. So, based on this record, I would not grant your motion for summary judgment.

I also agree that it is an issue for determination by the Court. I assume the Plaintiff doesn't disagree with that, although I'll give him an opportunity to respond. We're going to get to this in a minute when we get into the government contractor immunity issue because I think that's also an issue for the Court to decide. Also, I don't think, and for specific reasons that we'll talk about, that the record is adequate for me to make that call right now on that defense.

It also makes no sense to me for me or the parties or their counsel to get together and spend the first three or four days of this trial, or however much it takes, sorting out these legal issues with respect to whether there was sufficient control over Mr. West by DynCorp for him to fall within the barred employee exception and whether the government contractor defense should apply.

[16] I'm inclined to think that maybe what we ought to do is to have a preliminary bench trial of some sort and get a complete record before me on those matters that need to be decided by me as a matter of law, and then if not dispose of, at least narrow, perhaps, the issues that are tried to the jury.

MR. SCOTT: Judge, on behalf of DynCorp, as far as the workmen's compensation issue, I think that's an excellent suggestion. However, I do say our position is that on the issue of the government contractor defense, that we believe that that's a jury issue.

Now, as I sit here today, I can't think of any case that touches on that issue that we've briefed back and forth.

Maybe the Court is correct, but it's my view that that's a jury issue, but maybe I'm wrong on that, Judge. Maybe I am.

All I would ask of the Court is 24 or 48 hours, something like that, to research that issue, just to make sure that from my client's perspective that I'm correct on that issue.

THE COURT: All right. We're not going to have anything cast in stone today.

On the worker's comp issue, what's your position on trying to get that resolved prior to [17] trial?

MR. STOLL: My suggestion is that we rule as a matter of law today. I don't think that we need to go any further, and the reason is because the affidavit of Michael Peterson is not based on personal knowledge.

I deposed Mr. Peterson on Thursday, and I have his deposition on my table, and I can read to you the portions of the deposition where I asked him, was he ever in Colombia? No, he was never in Colombia. Did he ever see the interaction between E.A.S.T. employees and DynCorp employees? No, he never did. He basically knew nothing of any of the substance in his affidavit.

I would request – if we are going to take this into deeper consideration, I would just request leave to file the relevant pages of the deposition showing that Mr. Peterson doesn't have the personal knowledge. He didn't get the position he has now as the administrator of the human resources section until, I believe it was, 2001. The relevant time period is '98 to 2000. During that time period is when Mr. Smith was in Larandia.

Now, DynCorp may not appreciate the fact that Mr. Smith is controverting the factual [18] assertions, but the point is that Mr. Smith has been pretty much correct so far. I mean, DynCorp attached an Exhibit 11, the specifications to the hopper, which weren't the specs that are involved in this case. Mr. Smith pointed that out.

THE COURT: We're going to get to all that. Let's don't get ahead of ourselves.

I'd also note that I have some – frankly, I understand you'd like me to rule as a matter of law on the worker's comp issue. I'll also say, for the benefit of the Defendants, that I think you've got a real uphill climb on that.

MR. SCOTT: Judge, I'm used to uphill climbs. I like skiing and mountain climbing, so that's not a problem.

THE COURT: All right. Having said that, with respect to all of these issues, particularly with the government contractor defense, Mr. Smith seems to have more knowledge about what DynCorp was doing than DynCorp itself has.

MR. STOLL: Agreed.

THE COURT: And yet there's not a whole lot of foundation in this record as to, how is it that Mr. Smith, who's employed by E.A.S.T., gets to speak for DynCorp?

* * *

[46] specifications the government signed off on, then you still have to show that you performed; and if there's a dispute about that, then that's likely a jury question.

My other concern is, in fairness to the Plaintiff, I don't think it's fair nor do I intend to allow the Defendant now

to go back and start trying to locate documents that support its defense at this late stage. I don't think that's appropriate.

So maybe on the government contractor issue, I think probably the best thing to do is deny your motion for summary. We'll try it based on whatever you've disclosed, whatever documents, exhibits you've listed; and if you have evidence that's listed in your pretrial statement that supports the defense, then we'll deal with it at trial.

MR. SCOTT: Okay.

THE COURT: Okay. Now, on the worker's comp issue, we did take a quick look at some cases. I think it's pretty clear that that is a question of law for the Court. And on that particular issue, I do think it would behoove us to have a pretrial evidentiary hearing. I would suggest the afternoon of April 20th. Unfortunately, my schedule is – April is very tight, and I've got the 21st as well. So I could [47] give you a day and a half, if necessary, to determine that issue, put on your evidence, and I can make that call and at least we can resolve that issue one way or the other.

MR. SCOTT: What time, Judge?

THE COURT: We start about 1:30 on the 20th, and if we don't finish that afternoon, I'll go over to the next day.

MR. STOLL: Will that require the affiants to be present?

THE COURT: I would think so, yes.

MR. STOLL: I just want to be clear.

THE COURT: The burden is on the Defendant, but I think you need to be prepared to have whatever evidence you have to refute their claim that the Borrowed Servant Doctrine applies.

MR. SCOTT: What the Court wants is live testimony?

THE COURT: Yes.

MR. SCOTT: Okay.

THE COURT: The only other thing I would request is that you exchange five days before that hearing a list of the witnesses and any documents that you intend to introduce into evidence in connection with that issue.

[48] MR. STOLL: Would the Court agree with me that the only witnesses that are relevant to this issue are the ones that submitted affidavits on this?

MR. SCOTT: I don't agree with that at all, Judge. We submitted an affidavit in support of summary judgment, but this is like an evidentiary hearing.

THE COURT: No, I'm not going to limit you.

MR. STOLL: That would just leave the door open to have additional testimony that goes outside of the record.

THE COURT: Well, yeah, but I do think they need to be contained within their exhibit list. I don't think you can come up with people that aren't on their witness list.

MR. SCOTT: Absolutely, Judge. This is like a trial de novo in a way. So we're entitled to offer any evidence we want on this issue.

THE COURT: I agree, as long as it's been disclosed.

MR. SCOTT: Absolutely.

THE COURT: Because, otherwise, they would be able at trial to introduce any evidence on that issue that is set forth in their pretrial statement.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

LAWRENCE E. WEST, JR., et al.,

Plaintiffs,

VS.

DYNCORP, et al.,

Defendants

Case No. 6:01-CV-146-ORL-31KRS

April 20, 2004

HEARING ON MOTION

Before the Honorable GREGORY A. PRESNELL
United States District Judge

APPEARANCES:

For the Plaintiffs: Bradley J. Stoll
1710-12 Locust Street
Philadelphia, PA 19103

For the Defendants: Thomas E. Scott, Jr.
1390 Brickell Avenue
Miami, FL 33131

John P. Falcone
750 Seventh Avenue
New York, NY 10019-6829

[2] PROCEEDINGS

THE COURT: Good afternoon. Please be seated.

All right. We're here today in West versus Dyncorp, case number 6:01 civil 146 Orlando.

MR. STOLL: Bradley Stoll.

THE COURT: Okay. Mr. Stoll.

Mr. Scott.

MR. SCOTT: Tom Scott and John Falcone for Dyncorp.

THE COURT: All right. This hearing today was noticed as a bifurcated bench trial on the worker's comp immunity defense raised by Dyncorp. I've got to break at three o'clock because another judge has to use this courtroom briefly for a criminal matter, so are you ready to put on your witnesses, Mr. Scott?

MR. SCOTT: Judge, I'd like to invoke the rule at this point.

THE COURT: Okay. We'll invoke the rule.

MR. STOLL: That's fine with me. May I have the first witness stay here and then the second witness, we'll call him in when he's ready.

THE COURT: It seems to me, you all are going to be calling the witnesses first, right?

MR. SCOTT: I would assume I'm going first [3] because we have a burden.

MR. STOLL: If we're going to trial – I don't mind who goes first, but if this is a bifurcated trial, if we were at trial, plaintiffs would be presenting their case and they would have the first go round. But it's up to you, of course.

THE COURT: Thanks. At least we have that straight.

This is a defense. They have the burden. It's a bifurcated proceeding. If I used trial inappropriately, I'm sorry. Mr. Scott, call your first witness.

MR. SCOTT: Judge, I'd like to put in evidence if I can by, I think I we have a stipulation on this, maybe we can agree to it. I really only have three exhibits and we have a stipulation on the record. I have, by agreement I'm putting in exhibit one which is the prime contract, exhibit 2 which is the subcontract, and exhibits 63 and 241 which are the employment records from EAST Corporation.

THE COURT: Hold on.

MR. STOLL: I don't know about the whole entire employment record.

MR. SCOTT: You can look through them or whatever. They're exactly pretty much what you have in

* * *

MILLER-DIRECT-SCOTT

[8] What is your position?

A. I'm the program director and vice president for Dyncorp.

Q. Tell the court what that job entails, what are your duties?

A. My responsibility is to oversee the contract that we have with the Department of State in performing the manual eradication, aerial eradication contract in Colombia, South America, Bolivia, Peru and Pakistan.

Q. Your background, very quickly. Let me rephrase. How long have you been associated with this program in one capacity or another?

A. Started the program in 1991. I was the safety manager. In 1996 I became the operations manager. In 1997 became the deputy, 2000 became the program director, and March of 2003 became vice president.

Q. Tell the court, and make this brief because I think the judge has read probably too much already, what the program, the eradication program between the Department of State and Dyncorp does, what it consists of?

A. The Department of State, obviously they gave us a contract to do manual eradication and aerial eradication in South America. But doing so they contracted several subcontractors, one being EAST, to [9] provide airline pilots, another subcontractor for MIS Systems and Logistics Systems. Our responsibility is to insure that all of the contract requirements are met. In Colombia we have total responsibility for that eradication program.

Q. Give the court a little bit of the hierarchy between DOS, Dyncorp and a vendor or subcontractor such as EAST.

A. According to the contract we're required, we're responsible for the contract obviously and that includes

subcontractors. We are required through a subcontract that the subcontractors meet all the requirements and all the standards that are set forth by the Department of State. We have total responsibility to insure that they follow the standards and we – I have all the control over the program. Our subcontractors have no direct communication, official communication with the state department.

Q. I want to direct your attention to exhibit 1 which is the prime contract, and specifically in relationship to the issue in this case, in this particular hearing. Let me hand you a copy of provision H-25, standards of conduct. Under that contract and that provision, what authority and requirements are there concerning the discharge of [10] employees?

A. The authority to discharge an employee lies with Dyncorp. These standards of conduct are laid out in our standards of conduct which we have all of the Dyncorp and EAST employees sign, and on the bottom of that contract it does say that if they don't keep up with the standards and conduct that they could be released or would be released.

Q. Under the terms of that contract in section H-25 does the Department of State have the right to request the termination of any employee and subcontracting employee at their desire?

A. Yes. The Department of State can insist that we release an employee and that is further stated in our subcontract with the subcontractor. If, in fact, the state department requests that I release an employee, I would then go to the president of the subcontractor and demand that they remove the employee from the contract.

Q. Exhibit 2, exhibit 2 is the subcontract. Let me direct your attention to provision B-4 of that contract with EAST.

THE COURT: Before you move on, you referred to H-25 as providing Dyncorp, I'm sorry, as providing, the Department of State has the ability to remove people. I don't see that in H-25.

* * *

[20] A. As far as I can recollect, the hospitalization, the medical program and the dental and the vision programs were available to the EAST employees at that time.

Q. Let me hand you a list just to make sure. Let me hand you these three documents, they came from his file.

MR. STOLL: Are we marking those?

MR. SCOTT: Just to refresh his memory.

A. Yes. Yes. This is the form that we use to provide medical insurance.

Q. Explain to the court, Mr. West was an OV-10 pilot for EAST. He was assigned – was he assigned to Larandia?

A. They're actually based in Patrick support division, sent to Colombia and at that particular time he was flying out of Larandia. They did not always fly out of Larandia.

Q. Would you explain to the court how Dyncorp is set up in Colombia in order to comply with this contract from a management structural standpoint?

A. We have a site manager in Colombia who works or reports to the senior aviation advisor who works for the

narcotics affairs section director in the U.S. Embassy. The site manager gives direction to the [21] operations manager located in Bogota who then passes the information to the FOL managers at the forward operating locations. The fixed wing lead, the rotary wing lead and the maintenance lead and logistics lead all work for the FOL manager and take direction from him.

Q. Just so the court understands because that was pretty quick, and to sort of summarize it –

THE COURT: I understand it.

Q. You stand in Patrick in Orlando.

A. Right.

Q. The person in charge in Colombia, the top person is the site manager?

A. Exactly.

Q. He reports directly to you?

A. Yes, sir.

Q. Under the site manager there's an operations manager?

A. Yes.

Q. What does the operations manager do?

A. He reports directly to Keith Sparks and he directs the FOL managers because there are more than one on what their missions are going to be, which he gets from the U.S. Embassy and controls the aviation operations.

[22] Q. Underneath the site manager and the operations manager, how many bases at this time, back in 2000, were there in Colombia?

A. I can't be positive. We at one point we had two, San Jose and Larandia, yeah, we did have two at that time, San Jose and Larandia.

Q. At the two bases, the person in charge, the person you described as the mayor is the FOL manager?

A. He's the FOL manager. He's overall in charge.

Q. And he reports back to –

A. At that time –

Q. – the operations or site manager?

A. At that time he reported directly to the operations manager who was a Dyncorp employee.

Q. What controls does the FOL manager have over employees at the base?

A. The FOL manager has the responsibility, overall responsibility. He provides and directs where the people will be staying. If it's very overcrowded, he takes care of the housing. He approves all of the flight missions, and all of the leads work and report directly to the FOL manager. The leads would in fact give daily direction as to where their employees would go, but the FOL manager's overall in charge.

Q. Does the FOL manager supervise flight planning

* * *

[40] Q. We'll get back to that. Let me ask you this. EAST headquarters in Chantilly, Virginia.

A. Right.

Q. Does EAST also have an office at Patrick Air Force base?

A. The only person that has – now we're talking 2000?

Q. I'm sorry. 1997 to 2000 is this timeframe is what I'm talking about, beginning of '97 to 2000.

MR. SCOTT: Just note my objection in the sense that I think the pertinent events are right before this, 1999, 2000. But I understand –

THE COURT: Is there some significance to going back to '97?

MR. STOLL: 1999. The beginning of 1999, was there an office manned by EAST at Patrick Air Force base.

THE WITNESS: When you say office, are you talking about, there was an employee there that had an office and worked there.

Q. Let me ask you this, was there a chief pilot?

A. Yes.

Q. And who was the chief pilot in 1999, early '99?

A. Greg Smith.

Q. And did Greg Smith have a secretary?

[41] A. No, he did not.

Q. Did Greg Smith have a clerk?

A. He had an accountant slash clerk.

Q. What was that accountant slash clerk's name? Does the name Paula Graves ring a bell to you?

A. Yes, it does.

Q. And is that that person?

A. Yes, it does. It is.

Q. And did the accountant have a secretary?

A. No.

Q. Did Mr. Smith have an office?

A. He had a desk.

Q. But did he have an office?

A. I really can't remember if he had an office back then. He did have a desk.

Q. And who was – you mentioned the word OPSCO. Can you tell the court what OPSCO is?

A. The OPSCO back in prior to '98 were the people that ran the operations at the FOLs, they were operations coordinators is what they were called.

Q. Was there also a OPSCO at Patrick if I may ask?

A. Ops manager.

Q. Ops manager at Patrick. And who was the ops manager at Patrick in early 1999?

A. Early 1999?

[42] Q. Yep.

A. It was myself. I was the deputy slash ops manager.

Q. Okay. So the chief pilot, do you know what the chief pilot's responsibilities are?

A. Standardization of the fleet, of the pilots.

Q. Does the prime contract have a section that defines key personnel to be used that Dyncorp must employ?

A. Yes, it does.

Q. Is chief pilot one of those jobs?

A. Yes, it is.

Q. Now, I'm not sure which exhibit the prime contract is.

MR. SCOTT: One.

Q. Exhibit one. I would ask you to turn to exhibit 1 and there's a section J 8 dash 8 which is about almost one-third of the way through the contract.

MR. SCOTT: What section, counsel?

Q. J 8 dash 8.

A. Okay.

Q. Does this section right here of the prime contract list the responsibilities –

THE COURT: Wait a minute. He may have found it, but I haven't.

* * *

[44] Q. Was that Greg Smith in 1999?

A. Yes, it was.

Q. Now, does this section right here list the duties that Dyncorp is required to have this individual perform?

A. Yes.

Q. Am I also correct that EAST can require this individual to do additional duties that are relevant to EAST's business?

A. As long as the pilot can do, complete these responsibilities without it affecting, yes.

Q. Now, this chief pilot is at Patrick Air Force Base?

A. Yes.

Q. You also mentioned that there is a base in Bogota?

A. Yes.

Q. Where Dyncorp has, I believe you called it a FOL manager?

A. That's not –

THE COURT: I don't think he said that.

THE WITNESS: Bogota is the main office. The FOL is at Larandia.

Q. What was the name of the manager at the Bogota office?

[45] A. Keith Sparks, site manager.

Q. Site manager. Isn't there also a lead fixed wing pilot from EAST that is stationed at Bogota office?

A. There's a standardization pilot.

Q. Standardization pilot.

A. Make sure we understand, there's a possibility that they could call the individual in Bogota a standardization slash lead pilot simply because lead pilots get paid an additional stipend and he may have to fly as a lead pilot sometime in Larandia, but there was no responsibility for a lead person in Bogota.

Q. Because there was no flights out of Bogota?

A. That's right.

Q. Correct. So this is an individual who is a manager of EAST who is stationed at Bogota?

A. For standardization purposes.

Q. For standardization. And when we refer to standardization purposes, we're talking about fixed wing aircraft?

A. Yes, sir.

Q. And the pilots that pilot those aircraft?

A. Yes, sir.

Q. Now, are you aware of the communications that go back and forth between the standardization officer of

* * *

[52] herbicide and I have to keep the aircraft maintained.

Q. Is this a service contract or an employment contract?

MR. SCOTT: Objection, conclusion.

THE COURT: Well, I know what it is. It's not an employment contract.

MR. STOLL: It's a service contract.

THE COURT: Yes, it is. And the service is to provide pilots, as best as I can tell, unless there's something in exhibit A or the proposal that says otherwise.

MR. STOLL: Okay. I'll move on from there.

Q. Is there also a lead pilot at the varying FOL bases in Colombia?

A. Yes, there is.

Q. And is that lead pilot the top EAST person at those facilities, top meaning the EAST person with the most authority?

A. Yes, that's true.

Q. And isn't the EAST person with the most authority in Bogota the standardization officer?

A. The EAST person in Bogota truly has no authority. He's a standardization pilot. He has no, he's not in anybody's chain of command.

Q. Then what's his purpose for being there?

[53] A. Standardization. He has the authority for the standardization of the pilots in Colombia to insure all of

those pilots are meeting their flight requirements and they're all flying in accordance with their procedures outlined by Dyncorp and the Department of State.

Q. So EAST insures that their pilots are current with their medical exams?

A. Mr. Durocher being the senior standardization pilot in Bogota would look to make sure. It is Dyncorp's responsibility to insure and in fact –

Q. My question is –

THE COURT: Wait a minute. Don't interrupt him.

THE WITNESS: Dyncorp's operation manager, who the standardization pilots would be working for because everybody has to be working for some Dyncorp person, has the responsibility over that person.

THE COURT: All right. Well, look, wait a minute. Under the subcontract EAST can't just send you, you know, anybody off the street. There are requirements that are in the subcontract that require EAST to provide pilots with certain qualifications, correct?

THE WITNESS: Yes, sir.

[54] THE COURT: And I take it the standardization officer in Bogota for EAST is responsible for EAST's meeting those requirements, that is, sending pilots who are qualified as stated under the subcontract?

THE WITNESS: Yes, sir.

THE COURT: All right.

MR. STOLL: Thank you.

Q. Do you know what other duties EAST assigns to its standardization pilot?

A. I don't know all of the duties of what he might do down there, but there's no reason that EAST couldn't give him additional duties as long as he could fulfill them.

Q. Do you know what all the duties of the lead pilot are down at the various bases in Colombia?

A. I would have to pull out their job description as far as what their duties are on a daily basis in Larandia, but in addition to what's in his job description, what EAST gives them I'm not aware of.

Q. Have you ever scheduled a rotation of pilots at your various bases?

A. Have I scheduled it?

Q. Yes.

A. No.

[55] Q. Do you know what kind of considerations go into the scheduling of rotations?

A. The rotations are set up basically, they're set at 15-13 to begin with, and then they're obviously varied depending on some people are getting sick, some people have vacation; so the people, the operations people working those rotations would take those things into consideration.

Q. Is it your testimony that Dyncorp schedules each individual EAST employees on rotation?

A. Dyncorp establishes the rotation, 15-13, 20-10, 28-14, whatever it is. EAST at that time would take and

put their own people in there and control that and there is flexibility one way or the other on that, yes.

Q. So basically Dyncorp just says there's a rotation requirement of 15 days on site, 13 days at home. EAST, you can put whatever pilots you would like to of your employees within that rotational requirement?

A. Yes. Except if the site manager in Bogota or the operations manager has an issue with that, like we did this week, we will call up EAST and tell them we will not accept this rotation, you have to bring this person back, and that was just done this week.

Q. That was this week?

[56] A. Yes, sir.

Q. Okay. What about the standardization pilot in Bogota, what if he has a problem with a certain EAST employee going on rotation?

A. He could take that up with the EAST employee who's doing the rotation.

Q. If an EAST line pilot wanted to go home because they had a family emergency, wouldn't they ask the lead pilot for permission?

A. They would ask the lead pilot for permission.

THE COURT: Wait a minute. Please.

Q. I'm sorry. I thought the answer was finished.

A. They would ask the lead pilot for permission. The lead pilot would go to the FOL manager and discuss it with the FOL manager to discuss transportation back. The site manager would be notified. And if there was no issue,

which there wouldn't be because of an emergency, he would be released.

Q. So if Mr. West wanted to leave Larandia, Colombia in February of 2000, he would have asked his lead pilot for permission to leave, am I correct?

A. That's true.

Q. Do you know what the lead pilot – do you know whether that lead pilot would have then asked the standardization officer in Bogota?

* * *

[59] Colombians how we're going to go in and fly that. And all it is what the lines would be with the GPS.

Q. So the EAST pilots decide?

A. The EAST pilots didn't decide anything. They took the block and showed what lines they would fly in those blocks.

Q. In those blocks the EAST pilots determined where they were going to spray?

A. In that block, yes.

Q. Are Dyncorp employees trained to plot spraying missions?

A. They are now but they were not then.

Q. In fact, isn't it a complex procedure to plot a spraying mission?

A. It's a simple GPS, if you've ever flown a global positioning, it's just like flying any other airplane. It's not very difficult.

MR. SCOTT: Objection, Your Honor. He's constantly cutting my client off.

MR. STOLL: I'm not cutting him off. I can't hear him.

THE COURT: Then Mr. Stoll, I suggest you ask the court for some assistance rather than just interrupting the witness. Not going to do it that way. I don't know where you're from, Philadelphia or [60] something. You're in the south down here and, you know, we just, we're civil down here, we're slow, we take things one thing at a time. We let people say what they want to say. We don't interrupt people. Maybe it's a cultural thing, but that's the way we do it.

MR. STOLL: Let me change my gears here and I'll do my best not to interrupt. It's not intentional. When I think you're finished I start going.

THE WITNESS: That's fine.

BY MR. STOLL:

Q. Have you ever been to a briefing for a spraying mission?

A. Probably once, maybe twice.

Q. When was that?

A. I can't remember, but it's been years. When I was the operations manager or the safety manager I was much more involved than I am now at this level.

Q. So is it safe to say that you were never at a briefing at Larandia base at the time Mr. West was in Larandia?

A. I cannot say that I was ever in a briefing when Mr. West was in Larandia, I cannot remember that.

Q. And you identified the players who attend those

* * *

[116] dollars they paid you to date?

A. No, I don't.

Q. Are you charging them for being here today?

A. Yes, I will.

Q. How much are you charging them on an hourly rate?

A. It's $150 an hour.

Q. How many times have you met with this attorney on this case, or an attorney at Mr. Walk's office?

A. A handful of times. I don't recall the number.

Q. Well, a handful of times, sir? You gave a deposition, didn't you?

A. Yes, I did.

Q. You gave one affidavit in reference to the summary judgment, you met with him about that, didn't you?

A. No, I did not.

Q. How many affidavits have you given in this case?

A. Two.

Q. Have you charged them for both of them?

A. Yes, I did.

MR. STOLL: Just a continuing objection to relevance.

MR. SCOTT: Relevancy, I think as a witness I have the ability to impeach him.

* * *

[121] A. That would come from the EAST, Robert told him to fly that way.

Q. If Mr. West wanted to go home for an emergency, who would he ask?

A. He would ask the lead pilot.

Q. Who paid Mr. West's paycheck?

A. EAST Incorporated.

THE COURT: We've already established that. We don't need to go over that.

MR. STOLL: Then I have no more questions.

THE COURT: All right. You may step down, sir. Thank you.

Okay. Do you have another witness?

MR. STOLL: Yes. Lawrence West.

Whereupon:

LAWRENCE E. WEST, JR.,

called as a witness, having been first duly sworn according to law, testified as follows:

DIRECT EXAMINATION

BY MR. STOLL:

Q. Good afternoon, Mr. West.

A. Afternoon.

Q. What is your current occupation?

A. I'm disabled.

Q. What was your previous occupation?

[122] A. Agricultural pilot.

Q. How long had you been an agricultural pilot?

A. Since I was 19.

Q. Did you ever work for a company called EAST, Inc.?

A. Yes, sir.

Q. When did you begin working for EAST, Inc.?

A. First time was in '91, I believe.

Q. And what was your position at EAST?

A. I was a T-65 at that time spray pilot.

Q. How long, in the 1991 time period, how long did you work at EAST?

A. It was, lacked a little bit being six months.

Q. Then after that six month period, did you leave EAST?

A. I had an accident off a horse.

Q. Did you return to EAST?

A. Yes, sir.

Q. How did you get your job back at EAST?

A. I called the chief pilot of EAST and they rehired me.

Q. And what year was this?

A. '92 or '93.

Q. How long did you work at EAST in the 1993 period?

[123] A. It was approximately the same amount of time.

Q. Six months and then you left?

A. Yes, sir.

Q. And did you return to EAST after that period?

A. Yes, sir. In '97.

Q. In 1997. How did you get your job back?

A. I called the chief pilot of EAST.

Q. Who was the chief pilot?

A. Greg Smith.

Q. And did you ask Mr. Smith for your job back?

A. Yes.

Q. Where was Mr. Smith located?

A. He was at Patrick Air Force Base.

Q. And what was his position?

A. He was the chief pilot.

Q. And did Mr. Smith grant your request to get your job back?

A. Yes.

Q. Now, in the fall of 1999 were you still working for EAST?

A. Yes, sir.

Q. Were you stationed at the Larandia, Colombia, base?

A. Yes, sir.

Q. Prior to actually arriving at Larandia, how did [124] you know to go to Larandia?

A. I was contacted by Greg Smith and told I'd be going to Colombia.

Q. Did you always receive your orders on where you were to report from an EAST employee?

A. Yes.

Q. Was it always Greg Smith?

A. Pretty much.

Q. Who sent you your plane tickets to travel to Colombia?

A. EAST.

Q. When you arrived, now we're talking the fall of 1999, did you travel from your home to Bogota?

A. Yes.

Q. When you arrived at Bogota, what did you do?

A. It would be late at night and we would go to the EAST pilot apartments.

Q. Did Dyncorp helicopter pilots also stay at those apartments?

A. No.

Q. Do you recall ever seeing a Dyncorp helicopter pilot at that apartment?

A. No.

Q. Did you at that time, did you meet with Mr. Durocher, the standardization officer, in Bogota?

* * *

[131] was for a one year period.

Q. Who did you understand your employer to be?

A. EAST.

Q. At any time you were in Larandia, Colombia in 1999 or 2000, did Dyncorp employees direct you where to spray?

A. No, sir.

Q. At any time when you were at the Larandia facility in 1999 and 2000, did a Dyncorp employee tell you what rotation you were on?

A. No, sir.

MR. STOLL: That's all I have, Mr. West.

THE COURT: Mr. Scott.

CROSS EXAMINATION

BY MR. SCOTT:

Q. Mr. West, are you still taking medication?

A. Yes, sir.

Q. Are you still taking Neurontin?

A. Yes, sir.

Q. Dopamax?

A. Yes, sir.

Q. And Duradean?

A. Yes, sir. Duradrin.

Q. Does these medications inhibit your ability to testify as a witness?

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
MIDDLE DISTRICT (ORLANDO)

LAWRENCE E. WEST, JR. and RENN WEST	Docket No. 6:01-CV-146-ORL-31KRS
Plaintiff	Orlando, Florida
v.	April 21, 2004
	9:10 a.m.
DYNCORP, a Virginia corporation	
Defendant.	

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	Wolk & Genter By: BRADLEY J. STOLL, ESQ. 1710-12 Locust Street Philadelphia, PA 19103
For the Defendant:	Cole, Scott & Kissane, P.A. By: THOMAS E. SCOTT, JR., ESQ. and JOHN FALCONE, ESQ. Pacific National Bank Building 1390 Brickell Avenue Third Floor Miami, FL 33131
Court Reporter:	Victoria A. Millonig, CSR, RPR, CP

* * *

[3] PROCEEDINGS

April 21, 2004 9:10 a.m.

THE COURT: Good morning, everyone.

MR. SCOTT: Good morning, Your Honor.

MR. FALCONE: Good morning.

MR. STOLL: Good morning.

THE COURT: Please be seated.

We're here this morning for a continuation of the hearing regarding defendant's motion for summary judgment as it relates to the workers' comp immunity defense and for other matters in connection with case number 601-CV-146, West versus Dyncorp.

Yesterday we took evidence. This morning I'll entertain argument of counsel on the issue.

(Trinity Prep students entered courtroom.)

We have some students here this morning.

(To the students) Where are y'all from?

STUDENTS: Trinity Prep.

THE COURT: Trinity Prep. Okay. Well, welcome to the United State District Court, the Middle District of Florida. We're just getting underway here this morning. I don't know how much time you have here, but I'll tell you what's going on so maybe it'll make a little bit more sense to

* * *

[40] control of the plaintiff's employer, and then, second, Dyncorp made a big issue about the credibility of the witnesses. I suggest that the credibility of Dyncorp's witnesses, Dyncorp's witnesses are just as good as E.A.S.T. is. E.A.S.T. is bidding on this contract every year. Mr. Miller, do you think he asked Mr. Violette, let me testify? There is some kind of bias. The Dyncorp pilots are bias. I think if the Court is going to make a credibility determination, there was an evidentiary hearing to determine as a matter of law whether this doctrine applies. I submit that it comes down to a credibility issue and that's for the jury to decide.

THE COURT: No, we're well beyond that Mr. Stoll. You agreed at the last hearing there is a question of law to determine. I wouldn't even have scheduled this hearing if there was some debate about that. I'm not going to let you flip-flop on that.

Let's take a ten or fifteen minute recess.

(A break was had.)

THE COURT: Back in session. All right. Normally, I would like to take this matter under advisement and give you a written argument opinion, but because we're in trial, I really feel it's best [41] for me to rule on this from the bench.

I will do a written order to follow obviously, but I don't want the lawyers, you know, to spend the next ten days getting ready for something that is not going to happen.

We are here on the motion by the defendant for judgment as a matter of law with respect to the workers' compensation immunity defense, which was raised initially by the defendant in its motion for summary judgment, and

based on the representation by counsel for both parties that it was a question of law and based on this Court's research and determination that indeed it is a question of law for the Court to determine. I scheduled an evidentiary hearing on the matter in order to take evidence relevant to the issue so the Court could make that determination rather than wait until the end of the trial, which doesn't seem to make sense. Yesterday, we took evidence and I heard testimony and I have considered the exhibits that were introduced into evidence, and in addition to the briefs of the parties, which are also extensive, I have already heard argument by counsel.

And based on the evidence presented, I would find as follows: The defendant, Dyncorp, had [42] a prime contract with the Department of State to run the government's drug eradication program in Columbia and perhaps other locations. The defendant's participation in that program was at the invitation of and in conjunction with the government of Columbia. There is a subcontract agreement and, of course, the prime contract was introduced in the records as Exhibit 1 and it speaks for itself. There was a subcontract agreement which was introduced as Exhibit 2 between E.A.S.T. and Dyncorp wherein E.A.S.T. would perhaps, among other things, provide fixed-wing pilots to Dyncorp at the Larandia, Columbia, base to fly out the government aircraft that was being used by Dyncorp and maintained by Dyncorp for the eradication operations. The subcontractor serves its contracts, but, as best I can tell from the evidence, the service provided to E.A.S.T. by Dyncorp was the provision of fixed-wing pilots for the eradication operations. In this regard, I'm going to refer specifically to the Larandia, Columbia operation.

Paragraph B-6 of the subcontract speaks of the – I'm sorry – A-1 of the subcontract provides the subcontractor, that is E.A.S.T., shall furnish labor, equipment and materials and supplies and [43] services as required pursuant to the work attached as Exhibit A and is specifically cited in the subcontractor's proposal to the buyer, dated November 13, 1997. Unfortunately, there is no Exhibit A attached to the subcontract attached in evidence, nor is there any proposal. So the services to be provided are not delineated in the subcontract covenants, which is in evidence, and based on the testimony and all of the other evidence I have seen, the only service that I can discern that E.A.S.T. provided to Dyncorp was the provision of fixed-wing pilots and that obligation included the obligation to provide pilots, who were adequately trained and qualified to fly the missions. There is some dispute as to who dictated the particular rotation, the 1513 rotation. I don't find that significant, frankly. It is clear that E.A.S.T. was the party who determined which pilots would be available or on board during any particular rotation.

Now, Mr. West was and had been off and on at least an employee of E.A.S.T. for a considerable period of time and E.A.S.T. and Dyncorp had had a relationship for a considerable period of time. And as we know, in February of 2000, Mr. West, in flying [44] a mission, ejected from the aircraft and was injured, which occasioned this lawsuit against Dyncorp. We also know from the subcontract on page four that E.A.S.T. and Dyncorp agreed that Dyncorp would name E.A.S.T. and its employees as additional insureds under Dyncorp's workers' compensation policy and that pursuant thereto Mr. West has received workers' compensation benefit payments as a result of the accident.

And that has been – that fact has been stipulated to by the parties.

So the question becomes whether the defendant is entitled to the immunity defense under the Borrowed Servant Doctrine. As I indicated, this is a question of law for the Court to determine and as part of that, I must make credibility determinations of the witnesses, among other things. I also believe that in making the determination as to whether Mr. West was a borrowed servant that that federal common law would apply. I base this both on the subcontracts, Paragraph F, which so provides as well as based on the case law that I have read including the Canty case in which Judge Highsmith analyzed the Borrowed Servant Doctrine and held that – that the issue is one of determination. The extent of the coverage under the Longshoreman's Act [45] federal law applies and he footnotes a statement in this regard, to the extent it prevails under Florida law, and as such is misplaced, I believe it is not binding on me that Judge Highsmith's analysis of the issue in that regard was correct.

The Court also concludes that the Florida Servant Doctrine does apply to the defense base and strangely enough, in a case, West v. Egongoer Division (ph), 765, Fed. 2d 526 DC Circuit addresses this issue, and it held that the Borrowed Servant Doctrine did survive the 1984 amendments to the Act. I found no reason to conclude otherwise. So I think clearly here, as a matter of law, I need to consider the defendant's defense as it pertains to this particular issue in this case. The parties also seem to agree that in making the determination as to whether Mr. West was a borrowed servant for purposes of immunity, that the Court should apply the nine-factor test enumerated in Canty v. Bottacchi, 849 F. Supp. 1552, which I cited

to you a moment ago, which also cites to the Fifth District case against Shell Oil Company, and in looking at those nine factors, the Courts have suggested that the first factor is perhaps the most important, however, each case is going to be different in terms of its [46] facts and the mix of factors that would resolve the issue in this particular case. I would note in passing that the – that the Cheryl case, which was cited by the plaintiff, and a lot of it of the other cases dealing with crane operators are quite different in that those cases, the crane operator is the employee of the crane company, is not only just operating a crane for the benefit of the vessel or whomever they are working for that day, but that his employer also owns a substantial piece of equipment to wit the crane and also has maintenance responsibilities for that equipment. As best I can tell, in this case, they didn't provide any equipment, airplanes, they didn't maintain the airplanes and provided no other equipment whatsoever for the conduct of those operations, so I think a lot of those crane cases, while they deal with the general proposition of being indistinguishable in that sense from what we have here.

With respect to the first factor that who has control over the employee and the work that he was performing, beyond your suggestions the detailed of the operation, I would note as follows: With respect to the eradication operation, it's with the subject of Mr. West's endeavor that that control [47] abides with Dyncorp. The only thing E.A.S.T. does in the process is to designate that Mr. West as being a pilot on that particular rotation and in addition to once the spray area is determined and the aircraft to be flown determined, the only real involvement that E.A.S.T. has in connection with the mission is divided upon among the pilots, the particular supply path to be employed in

this particular operation which seems to me to be hand in hand with flying the airplane because obviously you don't want to spray the same area or run into the each other in the process. So E.A.S.T. has the responsibility of allocating or amongst the pilots involved in any particular mission the division of responsibility for spray passing, but beyond that, I can't see that E.A.S.T. has any real decision-making responsibility or authority in the process.

As I indicated the decision of what area to spray on any given day is made by the government in conjunction with Dyncorp. The particular aircraft, that is a decision made by Dyncorp. The mission has to be approved by FOL, employee of Dyncorp, and clearly those pilots are operating under the control and the supervision of Dyncorp, under the contract and documents that have been introduced into [48] evidence. And its clear that Dyncorp has the right to remove pilots from the operation and to discipline the pilots. As I indicated, Dyncorp provides all of the equipment, both aircraft and other equipment necessary to conduct the operation, provides the maintenance, provides the living facilities, essentially provides everything to conduct the operation. The only thing that E.A.S.T. does is to ensure that the pilots descends to Dyncorp are trained and qualified as part of that. They actually have to keep up with the administrative burden of determining who will fly and what particular rotation and make sure that the paperwork is current and that the pilots are properly trained and qualified. But once those pilots arrive at Larandia, it seems to me they are essentially an employee of Dyncorp for the purpose of eradicating cocaine plants under this operation.

So factor two, whose work is being performed; I think it's Dyncorp's work. The only work that E.A.S.T. is involved in connection with this matter is in essence loaning pilots to Dyncorp, trading pilots. They don't do anything else; they just provide pilots.

Was there an agreement between the original [49] and the borrowing employer in question? We have the subcontract agreement and I have noted portions of that that pertain to this issue, and I might say that in that regard, I believe that that provision in the subcontract agreement states whereby Dyncorp would provide the comp coverage for E.A.S.T. pilots as instructive and pervasive because they are businessmen who would not normally agree to provide comp coverage for someone else's employees. So at least to me it indicates as an indicator a borrowed servant is significant where you are providing comp coverage for those employees. Do the employee acquiesce to the new situation? Yes. I mean, there was no objection by Mr. West of what he was doing. Did the original employer terminate his relationship with the employee? No, he didn't. That's because West was essentially in the business of providing or loaning pilots to Dyncorp for a mission, who furnished the tools and placed it. That was done for Dyncorp. They provided the aircraft, the maintenance, all of the other tools, housing, et cetera, necessary to perform the job. Was an employment offered as to the amount time? Yes, it was. This is noted in one of the situations where you hire a trainee for three days, unload your [50] vessel, this remains to have been going on for a considerable period of time. Do we have the right to discharge an employee? I guess, I guess that would be a matter of semantics. Dyncorp had the right to remove the employee from the operation, but, no, no authority to

terminate his employment. E.A.S.T. had the right to terminate his employment, but did not have the right to force Dyncorp to accept him as a pilot. But, only in the context of this dispute I think its significant that Dyncorp had the right to remove any pilot from the operation under its discretion and why they would certainly contact the Dyncorp lead pilot, it was Dyncorp's decision whether he was to see a review board or some other method to make that determination is a matter of their discretion.

And the final factor, of course, is that E.A.S.T. did pay the employee, so that's a factor if they waive that in favor of the plaintiff. Let me say also that in determining this matter I had to consider the credibility of the witnesses and I essentially discounted Mr. Smith's testimony entirely. First, I found his testimony – it felt to be evasive and not critical. Secondly, I was offended by the fact he was being paid by the [51] plaintiff or plaintiff's counsel to be a fact witness.

MR. STOLL: Your Honor, I –

THE COURT: Maybe I've come from the old school, but I always thought it was unethical to do that and Mr. Smith said yesterday he was being paid to testify in this case and not just as an expert, but as a fact witness. And I think – I think that's not only disturbing itself, but I think its improper. But, in view, it didn't serve any purpose. It just undermined his credibility in my eyes.

So, on balance, considering the nine factors, I think its clear to me that this situation where the Borrowed Servant Doctrine would apply and that Dyncorp should be provided – given the immunity provided by the statute. So, to that extent, I will enter judgment for the defendant. I

will do a written order to that and that will be in the form that can be used if necessary for appellate review.

What we do is file the fraud. During the break I looked at that briefly and I really don't think that issue has been specifically reached in any meaningful way. I don't know if you want to [52] split up supplemental briefs on that. I don't think we are ready to go to trial on that issue in ten days, whatever, so I'm going to remove this from the May trial docket and work on an order addressing my comments here this morning.

So let me ask you how you want to deal with the fraud issue.

MR. STOLL: This is a fraud count of willful misconduct which is also intentional, wanton, authoritative – I agree with your further briefing, also.

MR. SCOTT: I will agree with you on the willful wanton count. I just don't know whether or not the immunity wipes that one out. I don't know the answer to that because that's an authority issue and there are some factual and legal issues, so I would agree with the Court to remove it from the calendar and let us rebrief the issue.

THE COURT: All right. I do think that the first issue is whether the immunity defense applies to that count.

MR. SCOTT: I don't know the answer. I don't want to misrepresent to the Court –

THE COURT: And I don't know whether there are disputed issues of material fact that would make [53] that a jury question. It seems to me they are two issues.

Do you want – I guess you should take the legal brief on that, Mr. Scott.

MR. SCOTT: Okay, Judge.

THE COURT: How much time do you want?

MR. SCOTT: Oh, ten days, two weeks, something like that. Whatever you want, whatever you say.

THE COURT: You don't care? Why don't you take twenty?

MR. SCOTT: That's fine.

THE COURT: I will give you twenty days to respond.

MR. STOLL: Okay.

THE COURT: Let's pick a particular date so we don't get involved in these counting problems. How about May 14th? That's for the defendant's brief and then June 4th for the plaintiff's brief on that issue. And I will take it off the May trial docket.

I thank you all for your efforts.

MR. STOLL: Before we leave, I think there is a housekeeping matter about certain exhibits not being moved and the exhibit that we are on, the [54] record does not contain the full page four of the contract. That's just for purposes of the complete record, but I move in whatever wasn't formally moved in yesterday. I know that the Court considered it, but just for the record, just in case.

THE COURT: What I considered was what was offered was Exhibit 1, 2 and 241, and nothing else was really offered yesterday, unless you think we need to

substitute to make sure there is a page four in the subcontract. What exhibits are you talking about, Mr. Stoll?

MR. STOLL: Ninety-six, which was also included in one of the exhibits moved in by Dyncorp, which was an employment document between E.A.S.T. and Mr. West.

THE COURT: It's 241?

MR. STOLL: Yes. Ninety-four was the individual air crew training showed that E.A.S.T. trained Mr. West.

Thirty-eight was a memo from E.A.S.T. to employ all E.A.S.T. pilots as far as elective discharge rights.

Forty-one was a memo to the Department of State submitted by Dyncorp and E.A.S.T. concerning the incident.

[55] And ninety-one was – was the Department of Defense's consent for clearance submitted by E.A.S.T. on behalf of Mr. West.

Is there any further discussion?

MR. STOLL: No.

THE COURT: Well, 944, 138 and 41. One, two, 241, and 241-A through E.

MR. SCOTT: Yes, sir.

THE COURT: That will be the record on appeal.

Okay, gentlemen. Thank you all for your time.

MR. STOLL: Thank you.

MR. SCOTT: Thank you, Your Honor.

THE BAILIFF: All rise, please.

(Judge Presnell exited the courtroom.)

(The hearing concluded at 10:50 a.m.)

No. 05-630

IN THE

Supreme Court of the United States

LAWRENCE WEST, JR. and RENN WEST,

Petitioners,

v.

DYNCORP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, the trial court and the Eleventh Circuit Court of Appeals correctly determined that West consented to a bench trial and waived his Seventh Amendment right to a jury trial by failing to raise a timely objection.

Whether the trial court and Eleventh Circuit Court of Appeals correctly applied the nine-factor test in *Ruiz* in determining that West was a borrowed servant of DynCorp based *inter alia* on DynCorp's control over West's day-to-day activities in Colombia.

LIST OF PARTIES

All Respondents, other than DynCorp, have either settled or have been dismissed from this action.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, DynCorp advises the Court that its corporate parent is Computer Sciences Corporation and there are no publicly traded companies that own 10% or more of DynCorp.

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Cases:

DynCorp prays that West's Petition for a Writ of Certiorari be denied because there are no compelling reasons for this Court to exercise its judicial discretion to grant a writ in this matter.

None of the considerations set forth in Rule 10 of the Supreme Court Rules regarding writ applications are present in this case. The decision of the Eleventh Circuit Court of Appeals is unpublished and not binding precedent. It does not conflict with any decision of this Court or any other United States Court of Appeals. As established by the record, Petitioners openly and willingly waived their Seventh Amendment right to trial by jury by failing to object to the bench trial on the issue of borrowed servant. Moreover, the District Court and the Eleventh Circuit correctly held that West was the borrowed servant of DynCorp and properly applied the nine-factor borrowed servant test in *Ruiz* that has been used as established legal precedent.

STATEMENT OF THE CASE

On February 6, 2000, West was involved in an accident while piloting an aircraft near Larandia, Colombia. At the time, West was engaged in a spraying mission as part of an international drug eradication program. West sued DynCorp and others for damages based upon negligent maintenance and repair, strict liability, fraud and misrepresentation, and willful, wanton and reckless misconduct. (D.E. 115)[1]. Petitioner Renn West, West's wife, brought a derivative claim for loss of consortium. DynCorp denied all liability and raised worker's compensation immunity under the LHWCA as an affirmative defense. (D.E. 124).

1. References to the record of the United States District Court for the Middle District of Florida will be designated as "(D.E. ___)."

A. Summary Judgment

DynCorp moved for summary judgment on all claims based, in part, on employer immunity under the LHWCA. (D.E. 175, 176). The borrowed servant doctrine was one of the issues raised by DynCorp in its motion.

On March 23, 2004, DynCorp's motion for final summary judgment was heard by the District Court. (D.E. 229). At the hearing, the District Court indicated that it would deny summary judgment because of disputed facts. (*Id.* at 15). Counsel for DynCorp candidly acknowledged that disputed facts would preclude summary judgment on borrowed servant. Nonetheless, DynCorp maintained that this issue should be resolved by the Court as a matter of law. (D.E. 229 at 13-14).

The District Court agreed with this position and advised the parties throughout the hearing that it intended to resolve the borrowed servant issue as a matter of law:

> THE COURT: Well, I think it is fair to say, [Counsel for DynCorp], and I appreciate your candor with the Court, that there appear to be, based on the record before me, issues of fact in dispute that are material which would bear on that issue. . . . It also makes no sense to me for me or the parties or their counsel to get together and spend the first three or four days of this trial, or however much it takes, sorting out these legal issues with respect to whether there was sufficient control over Mr. West by DynCorp for him to fall within the barred employee exception and whether the government contractor defense should apply.

> *I'm inclined to think that maybe what we ought to do is to have a preliminary bench trial of some sort and get a complete record before me on those matters that need to be decided by me as a matter of law, and then if not dispose of, at least narrow, perhaps, the issues that are tried to the jury.*

(D.E. 229 at 15-16) (emphasis added).

The District Court further stated as follows:

> . . . Now, on the worker's comp issue, we did take a quick look at some cases. I think it's pretty clear that that is a question of law for the Court. And on that particular issue, I do think it would behoove us to have a pretrial evidentiary hearing.

(*Id.* at 47) (emphasis added).

At the same hearing, counsel for West agreed with the District Court that the borrowed servant issue must be resolved prior to trial:

> THE COURT: All right. We're not going to have anything cast in stone today. On the worker's comp issue, what's your position on trying to get that resolved prior to trial?
>
> [COUNSEL FOR WEST]: My suggestion is that we rule as a matter of law today. I don't think that we need to go any further, and the reason is because the affidavit of Michael Peterson is not based on personal knowledge. . . .

(*Id.* at 16-17).

After obtaining the approval of both parties, the District Court reserved the dates of April 20th and 21st, 2004 to resolve the borrowed servant issue "one way or the other." (*Id.* at 46-47). Consistent with a bench trial, the District Court instructed the parties that it would hear live testimony at this proceeding and did not limit witnesses to affiants for the summary judgment and response motions. (*Id.* at 47-48).

The District Court subsequently issued an Order denying DynCorp's motion for summary judgment on borrowed servant and other issues citing "conflicting evidence on the record." (D.E. 227 at 3). The Order further advised the parties that "whether West [was] a borrowed-servant of DynCorp [was] an issue for the Court to decide as a matter of law. A pretrial evidentiary hearing . . . [was] set to aid the Court's determination of this issue." (*Id.* at 227 at 3 n.1) (citation omitted). At no point did West file an objection to the upcoming proceeding.

B. Bench Trial

On April 20th and 21st, the District Court held a two-day bifurcated bench trial to determine whether West was DynCorp's borrowed servant. (D.E. 242, 260). The only issue submitted to the District Court was whether West was a borrowed servant of DynCorp. (D.E. 242 at 2). Both parties presented witnesses, documents, and participated in oral argument. (D.E. 242, 260.)

After considering the evidence, the District Court made, *inter alia*, the following findings and conclusions:

(1) DynCorp had a Prime Contract with the Department of State to run the government's drug eradication program in Colombia.

(2) DynCorp's participated in that program at the invitation of and in conjunction with the government of Colombia.

(3) Under the subcontract, EAST would provide fixed wing pilots to DynCorp at the Larandia, Colombia base to fly out of government aircraft used by DynCorp for the eradication operations.

(4) The only service that EAST provided to DynCorp was the provision of fixed-wing pilots who were adequately trained and qualified to fly missions.

(5) EAST determined which pilots would be available or on board during any particular rotation.

(6) Under the subcontract, EAST and DynCorp agreed that DynCorp would name EAST and its employees as additional insured under DynCorp's worker's compensation policy and pursuant thereto . . . West received worker's compensation benefit payments as a result of the accident.

(D.E. 260 at 41-44).

Based on these findings and the parties' consent that this issue be resolved as a matter of law, the District Court determined that West was a borrowed servant of DynCorp under the nine-factor test in *Canty v. A. Bottacchi, S.A. de Navegacion*, 849 F. Supp. 1552 (S.D. Fla. 1994) *citing Ruiz v. Shell Oil Co.*, 413 F.2d 310, 313 (5th Cir. 1969); *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988) (applying *Ruiz* factors); *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986) (same). (D.E. 260 at 45, 51).

At no time did West move for reconsideration of the District Court's ruling, argue that his right to a jury trial had been violated, or otherwise provide the District Court with an opportunity to address his alleged Seventh Amendment violation.

West appealed this ruling to the Eleventh Circuit Court of Appeals. In his initial and rely briefs, West argued: (1) that his Seventh Amendment Rights had been violated; (2) that the District Court improperly resolved issues of fact and assessed the credibility of witnesses in applying the nine-factor borrowed servant test; and (3) that the District Court's determination that West was DynCorp's borrowed servant was unsupported by the record. However, at no point did West argue that the District Court's application of the nine-factor borrowed servant test was in conflict with any Eleventh Circuit opinion or the decision of any other circuit court.

On August 15, 2005, the Eleventh Circuit Court of Appeals issued an unpublished *per curiam* opinion affirming the District Court's decision that West was DynCorp's borrowed servant. *See* Petitioners' Appendix at 1a-4a. In the opinion, the Eleventh Circuit stated that its "examination of the record l[eft it] with no doubt that West consented to the bench trial and thereby waived his Seventh Amendment right to have a jury decide the issues of fact involved in the application of the borrowed servant doctrine." *Id.* at 4a. The Court further stated that it found no error in the District Court's resolution of the borrowed servant issue. *Id.*

West's Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

The evidence adduced at the bench trial on April 20th and 21st demonstrated the following:

A. The Prime Contract

DynCorp had a contract (the "Prime Contract") with the Department of State to eradicate illicit drugs in South America and Pakistan. (D.E. 242 at 8-9). Under the Prime Contract, DynCorp was responsible for meeting the contract requirements and all standards set forth by the Department of State concerning the program. (*Id.* at 9).

B. The Subcontract

The Prime Contract required fixed wing pilots to fly aircraft and conduct aerial spraying missions. (D.E. 242 at 8-9). Since DynCorp did not have its own fixed wing pilots, it subcontracted with EAST, a nonparty, for qualified pilots. (*Id.* at 47, 49). Under the subcontract, EAST supplied DynCorp with fixed wing pilots, including West.

As a subcontractor, EAST had no direct or official communication with the Department of State. (*Id.* at 9). By contrast, DynCorp had weekly briefings with the Department of State. (D.E. at 24).

C. In-Processing

To participate in the eradication program, all personnel were registered through in-processing. The in-processing procedure was the same for both EAST and DynCorp employees. (*Id.* at 18). Employees from both companies were required to sign DynCorp's standards of conduct. DynCorp

retained the right to remove any EAST employee from the program with or without cause. (*Id.* at 10, 12, 15).

DynCorp acted as a *de facto* employer to EAST's pilots. DynCorp maintained flight records for both EAST and DynCorp pilots and ensured that all pilots met the required flight time. (*Id.* at 32). Only payroll stubs and hours for EAST employees were remitted to EAST. (*Id.* at 32-33). Although West was paid by EAST, EAST billed DynCorp on a monthly basis for the use of these pilots. (*Id.* at 33). DynCorp had the right to review and object to the invoices. (*Id.*)

D. Chain of Command

In Colombia, DynCorp conducted its spraying missions from two Forward Operating Locations (FOLs) in Larandia and San Jose. (*Id.* at 22). FOLs are similar to bases and housed both EAST and DynCorp personnel. West was stationed at the FOL in Larandia.

The FOL manager, a DynCorp employee, was responsible for providing administration, logistics, facilities, security, and safety, to both EAST and DynCorp employees at the FOL and approved all flight missions for that FOL. (*Id.* at 17-18; 22). The fixed wing lead pilot, rotary wing lead pilot, maintenance lead, and logistics lead were stationed at the FOL and received direction from the FOL manager. (*Id.* at 21). The fixed wing lead pilot was the highest-ranking EAST employee at the FOL in Larandia. (*Id.* at 26, 94-95). However, he was not a key employee under the contract. (*Id.* at 73).

The FOL manager reported to the operations manager (a DynCorp employee) stationed in Bogota, Colombia.

The operations manager, in turn, reported to the site manager, the top DynCorp employee in Colombia. (*Id.* at 20-21).

In Bogota, EAST also had a standardization pilot who ensured that EAST pilots were operating safely within standardized procedures. (*Id.* at 26). However, that employee had no authority over the spraying missions. (*Id.*).

E. Operations in Larandia

At the FOL, DynCorp treated all personnel, including EAST employees, the same. Both EAST and DynCorp employees were transported in the same manner and received the same daily allowance for their food. (*Id.* at 35-36). Like DynCorp employees, EAST employees were subject to random drug tests by DynCorp and would be released for a positive drug test. (*Id.* at 15-16). Drinking while in Larandia was prohibited for all personnel including EAST employees. (*Id.* at 16-17).

Once a pilot or mechanic arrived in Larandia, the FOL manager was responsible for providing housing accommodations. (*Id.* at 22). The housing provided to EAST personnel was the same as provided to DynCorp employees:

> DynCorp pilots, EAST pilots all live together in the same building and there's probably 15 or 16 people live there. Also in that same building were the SAR community of pilots, the rescue pilots. Not the – and the rescue men. The helicopter pilots and the EAST pilots both were there and the SAR.

(D.E. 242 at 81).

Through funding from the Department of State, DynCorp provided flight suits, boots, and bunks to all personnel, including EAST pilots. (*Id.* at 28). Although the Department of State supplied the aircraft, DynCorp was responsible for maintaining them. (*Id.*). EAST was allowed to assign its pilots to a particular work rotation; however, this was subject to review by DynCorp. (*Id.* at 55).

F. Spraying Missions

Prior to a spraying mission, the Colombian government determined what areas DynCorp was allowed to spray in. (*Id.* at 58). This information was communicated to DynCorp's FOL manager through the U.S. Embassy. (*Id.*). The FOL manager attended meetings for all operations and supervised flight planning and preparation for the missions. (*Id.* at 22-23). The FOL manager had final authority over the spraying missions because DynCorp was ultimately responsible to the Department of State for conducting the operations. (*Id.* at 24).

The FOL manager gave directives on the spraying missions to all the pilots, including West. (*Id.* at 83). Within the block designated by the Colombian government, the EAST fixed wing lead pilot determined what spray paths would be flown by a particular pilot. (*Id.* at 59, 144). EAST assigned these spray paths for accountability and record keeping purposes. (*Id.* at 144).

G. Worker's Compensation Benefits

The Prime Contract required that DynCorp obtain Defense Base Act Insurance for all employees who would be working overseas under the contract. (D.E. 242. at 146-

147). The subcontract required that DynCorp include EAST as an additional insured under its worker's compensation policy, in conformity with the Prime Contract. (*Id.*).

At the commencement of the bench trial, the parties stipulated that DynCorp provided worker's compensation benefits to West. (*Id.* at 6-7). West had received $225,000 in benefits under DynCorp's worker's compensation policy. (*Id.* at 6). In fact, DynCorp's policy had paid all medical bills for West's orthopedic and back injuries sustained in this accident.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied because Petitioners have failed to show that this case warrants the Court's consideration. First, the record clearly establishes that West waived his right to a trial by jury on the borrowed servant issue. Second, Petitioners' conflict claim is entirely fabricated. The Eleventh Circuit Court's affirmance of the District Court's ruling that West was DynCorp's borrowed servant is supported by the record and comports with the holdings of *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000) and *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986). Third, the Eleventh Circuit Court's ruling below is an unpublished opinion and not binding precedent. Thus, it will not impact future cases.

I. PETITIONERS' SEVENTH AMENDMENT ARGUMENT IS WITHOUT MERIT BECAUSE THE RECORD SHOWS PETITIONERS KNOWINGLY AND WILLINGLY PARTICIPATED IN THE BIFURCATED BENCH TRIAL AND FAILED TO RAISE A TIMELY OBJECTION

The law is well settled that litigant waives his or her right to a jury trial by participating in a bench trial and failing to raise a timely objection. *Southland Reship v. Flegel*, 534 F.2d 639, 645 (5th Cir. 1976). Here, the record is clear that West waived his right to a jury trial by: (1) failing to object and in fact consenting to the District Court determining the borrowed servant issue as a matter of law; (2) fully participating in the bench trial; and (3) failing to alert the District Court of the alleged Seventh Amendment violation despite numerous opportunities to do so.

At the summary judgment hearing, DynCorp candidly acknowledged that disputed facts would preclude summary judgment on borrowed servant. Nonetheless, DynCorp maintained that this issue should be resolved by the Court. (D.E. 229 at 13-14). The District Court agreed with this position and was clear throughout the hearing that it intended to resolve the borrowed servant issue as a matter of law.

> It also makes no sense to me for me or the parties or their counsel to get together and spend the first three or four days of this trial, or however much it takes, sorting out these legal issues with respect to whether there was sufficient control over Mr. West by DynCorp for him to fall within the barred employee exception and whether the government contractor defense should apply.

> I'm inclined to think that maybe what we ought to do is to have a preliminary bench trial of some sort and get a complete record before me on those matters that need to be decided by me as a matter of law, and then if not dispose of, at least narrow, perhaps, the issues that are tried to the jury.

(D.E. 229 at 15-16) (emphasis added).

At the same hearing the District Court further stated:

> THE COURT: Okay. Now, on the worker's comp issue, we did take a quick look at some cases. I think it's pretty clear that that is a question of law for the Court. And on that particular issue, I do think it would behoove us to have a pretrial evidentiary hearing.

(*Id.* at 47) (emphasis added).

Despite clear indication by the District Court, at no time during the March 23, 2004 hearing did West protest that his right to trial by jury would be violated if the borrowed servant issue was decided by the District Court. On the contrary, counsel for West agreed with the District Court that this issue should be resolved prior to trial:

> [COUNSEL FOR WEST]: My suggestion is that we rule as a matter of law today. I don't think that we need to go any further, and the reason is because the affidavit of Michael Peterson is not based on personal knowledge. . . .

(*Id.* at 16-17). By contrast, at the same hearing, West was very adamant that he believed another issue, the government contractor's defense, was a jury question. (*Id.* at 43).

West's failure to raise any objection at the summary judgment hearing on the District Court determining borrowed servant coupled with his consent (at the same hearing) to resolving this issue as a matter of law is sufficient to establish waiver of his right to a jury trial. *See Haynes v. W.C. Cave & Co., Inc.*, 52 F.3d 928, 930 n.3 (11th Cir. 1995) (concluding that a failure to object to a fact-finding proceeding could waive the right to a jury trial).

> [W]here [as here] a party has made a general demand for a jury trial and the court subsequently determines that a certain issue will be determined non-jury, it is incumbent upon that party to timely lodge a specific objection in order to preserve any Seventh Amendment jury trial right he may have with respect to that issue.

In re City of Philadelphia Litigation, 158 F.3d 723, 727 (3d Cir. 1998).

Accordingly, West's claim that his Seventh Amendment rights were violated is without merit and does not provide a basis for certiorari review.

II. THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH THE RULING OF ANY OTHER CIRCUIT AND IS PLAINLY CORRECT.

A. There is no Conflict between the Eleventh Circuit Court's Ruling and The Rulings Of Other Circuits.

Petitioners seek Writ of Certiorari under the pretext that the Eleventh Circuit Court of Appeals and the District Court rendered decisions which allegedly conflict with the decisions of the Fourth and Fifth Circuit Courts of Appeals in *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000) and *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986). *See* Petitioner for Writ, p. 8. However, the Eleventh Circuit did not announce any controversial rule of law in this litigation. Rather, its decision that the trial court correctly applied the nine-factor borrowed servant test comports with prior rulings in its own circuit and the holdings of *White* and *Capp*.

In *White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000), the Fourth Circuit determined that the plaintiff was a borrowed servant of defendant Bethlehem Steel. The court considered the following facts supporting borrowed servant status: (1) the plaintiff's employer paid plaintiff's wages and insurance but passed those costs through to Bethlehem Steel; (2) Bethlehem Steel employees would tell the plaintiff where to go; (3) Bethelem Steel could effectively fire the plaintiff by excluding him from a job site; (4) and Bethlehem Steel assigned the plaintiff to the ships where he would work. *Id.* at 150.

These facts supporting borrowed servant in Bethlehem Steel are also present in our case. Although West was paid by EAST, EAST billed DynCorp on a monthly basis for the use of its pilots, including West. (D.E. 242 at 33). DynCorp retained the right to remove an EAST employee from the program with or without cause. (*Id.* at 10, 12, 15). Pilot assignment to a particular work rotation was subject to review by DynCorp (*Id.* at 55). Moreover, a DynCorp employee, the FOL manager, approved all flight missions and was responsible for providing administration, logistics, facilities, security, and safety for both EAST and DynCorp employees. (*Id.* at 17-18; 22). Lastly, the FOL manager gave directives on the spraying missions to all the pilots, including West, and had final authority over the spraying missions. (*Id.* at 24, 83). Thus, under *White*, West would still be DynCorp's borrowed servant.

Moreover, notwithstanding Petitioners' unfounded contention, *White* and *Capp* do not stand for the proposition that the borrowed servant doctrine requires a direct supervisory role by the borrowing employer. Supervision of the borrowed employee is only a factor in determining whether the control prong is met. In fact, *White* noted that other factors in addition to supervision should also be considered:

> In order to determine direction and control, a court may look at factors such as the supervision of the employee, the ability to unilaterally reject the services of the employee, the payment of wages and benefits either directly or by pass-through, or the duration of the employment. *Ultimately, any particular factor only informs the primary inquiry*

> *– whether the borrowing employer has authoritative direction and control over a worker.*

White, 222 F.3d at 149. (emphasis added). Thus, neither *Capp* nor *White* support West's contention that a direct supervisory role is a *sine qua non* to finding borrowed servant status. The District Court and the Eleventh Circuit's decision in the instant case do not conflict with *White* or *Capp* in any sense of the word.

In any event, the record supports the District Court's determination that DynCorp's relationship with West satisfied the control factor in the nine-factor borrowed servant test. (D.E. 260 at 46-47). Under the Prime Contract, DynCorp had final authority and was ultimately responsible to the Department of State for the operation of the program. (D.E. 242 at 9). DynCorp had final authority and was ultimately responsible for operations. (*Id.* at 24). DynCorp also had authority over the assignment of pilots to a rotation and could seek the removal a pilot from a rotation. (*Id.* at 34-35). By contrast, EAST's role was limited to supplying pilots. (*Id.* at 49).

Moreover, the District Court's inquiry in deciding that the control factor favored DynCorp was not limited to the terms of the prime contract, as West contends. *See* Petition for Writ, p. 9. The District Court considered the day-to-day operations of the drug eradication program and found that EAST had very little involvement with the spraying missions:

> [t]he only thing EAST d[id] in the [spraying mission] process [was] to designate . . . West as being a pilot on that particular rotation and . . . once the spray area [was] determined and the

> aircraft to be flown [were] determined, the only real involvement that EAST [had] in connection with the [spraying] mission [was] divided amount the pilots, the particular supply path to be employed in this particular operation which seems to me to be hand in hand with flying the airplane because obviously you don't want to spray the same area or run into each other in the process.

(D.E. 260 at 47).

The District Court's findings were supported by Norbert Violette, an EAST employee and former DynCorp OPS Manager, who testified at the bench trial that the purpose of assigning spray lines to pilots was for accountability and record keeping purposes. (D.E. 242 at 144). Thus, as in *Capp* and *White*, the District Court appropriately evaluated the control factor by looking to the working relationship between DynCorp and EAST employees and correctly determined that DynCorp exercised control of West.

Lastly, Petitioners' claim that "[t]he precedent now established in the Eleventh Circuit is that any prime contractor or general contractor by virtue of its contractual superiority over a subcontractor subsumes the latter's employees as its own." *See* Petition for Writ of Certiorari, p. 9. This argument is entirely meritless.

First, there is no support for Petitioners' contention that the Eleventh Circuit's five page *per curiam* unpublished opinion uprooted the nine-factor borrowed servant test for a single factor inquiry concerning contractual roles. *See* Petition for Writ of Certiorari, p. 9. In the decision below, the Eleventh Circuit merely held that the record supported

the trial court's ruling that DynCorp exercised control over West. "[W]e find no error in the [district] court's resolution of those issues of fact and its conclusion that West was a borrowed servant." (Petitioners' Appendix at 4a). Thus, the Eleventh Circuit's opinion does not abrogate or alter the nine-factor test in any way. Of note, the opinion below does not single out any particular factor that was determinative to the borrowed servant issue; thus, the undersigned is uncertain how Petitioners were able to pinpoint the control factor as creating a conflict between the opinion below and the holdings of *Capp* and *White*.

More importantly, the opinion below is an unpublished opinion and has no precedential value. "Unpublished opinions are not considered binding precedent." 11th Cir. R. 36-2. Thus, the District Court's ruling below will have no impact on future cases concerning the borrowed servant doctrine in the Eleventh Circuit or in any other circuit.

Accordingly, West's Petition for Writ of Certiorari should be denied.

B. The Decision Of The District Court And Affirmance By The Eleventh Circuit That West Was A Borrowed Servant Of DynCorp Were Plainly Correct

The decision of the District Court and the Eleventh Circuit's ruling affirming same are plainly correct. As indicated above, the record supports to District Court's determination that West was DynCorp's borrowed servant. After considering the evidence and applying the nine factors enumerated in *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 313 (5th Cir. 1969), the District Court found that six out of the nine

factors favored DynCorp. (D.E. 260 at 46-51). The factors favoring DynCorp were: (1) control over the employee and the work he was performing; (2) whose work was being performed; (3) an agreement, understanding, or meeting of the minds between the original and the borrowing employer; (4) employee acquiescence to the new work situation; (5) furnishing of tools and place for performance; and (6) new employment over a considerable length of time.

1. Control

With respect to the first factor, control, the District Court concluded that DynCorp had control over West and the spraying missions he worked on. (D.E. 260 at 46-47). This finding was clearly supported by the record. Under the Prime Contract, DynCorp had final authority and was ultimately responsible to the Department of State for the operation of the program. (D.E. 242 at 9). DynCorp had final authority and was ultimately responsible for operations. (*Id.* at 24). DynCorp also had authority over the assignment of pilots to a rotation and could seek the removal a pilot from a rotation. (*Id.* at 34-35). By contrast, EAST's role was limited to supplying pilots. (*Id.* at 49).

In determining that this factor favored DynCorp, the District Court found that EAST had very little involvement with the spraying missions:

> [t]he only thing EAST d[id] in the [spraying mission] process [was] to designate . . . West as being a pilot on that particular rotation and . . . once the spray area [was] determined and the aircraft to be flown [were] determined, the only real involvement that EAST [had] in connection

> with the [spraying] mission [was] divided amount the pilots, the particular supply path to be employed in this particular operation which seems to me to be hand in hand with flying the airplane because obviously you don't want to spray the same area or run into each other in the process.

(D.E. 260 at 47).

West claims that the Eleventh Circuit in affirming the District Court has now established "that any prime contractor or general contractor by virtue of its contractual superiority over a subcontractor subsumes the latter's employees as it own for purposes of workers' compensation immunity." *See* Petitioner for Writ of Certiorari, p. 9. But the record, as indicated above, shows that the District Court's inquiry was not limited to the language of the prime and sub contracts. The District Court also looked to the actual practice between West's employer and DynCorp, as did the court in *White*, 222 F.3d at 150, and determined that West was DynCorp's borrowed servant.

2. DynCorp's Work Was Being Performed

The record also supports the District Court's finding that West was performing DynCorp's work at the time of the accident. In Larandia, West's job was to fly fixed wing aircraft for spraying missions. He lived and operated out of DynCorp's FOL. The accident occurred while West was on a spraying mission. West's aircraft was maintained by DynCorp mechanics. (*Id.* at 28). Thus, there was sufficient evidence for the District Court to conclude that it was DynCorp's work that was being performed.

3. Agreement Between EAST and DynCorp

There was clearly an agreement between EAST and DynCorp as evinced by the subcontract and the acts of the contracting parties. Pursuant to the subcontract, EAST supplied DynCorp with qualified pilots. (D.E. 242. at 47, 49). In order to satisfy its contractual obligations, EAST had the administrative burden of ensuring its pilots were qualified. In exchange, DynCorp paid EAST for the use of these pilots in its spraying missions. Further, DynCorp had the contractual obligation to provide worker's compensation benefits for these pilots. (*Id.* at 13, 19-20). The District Court found this "instructive and pervasive because [DynCorp and EAST] are businessmen who would not normally agree to provide comp coverage to someone else's employees." (D.E. 260 at 49).

4. West Acquiesced to a New Work Situation

In order to perform DynCorp's work, West moved to a foreign country. He agreed to have his living and working environment dictated by DynCorp: he lived on DynCorp's FOL, slept where DynCorp directed him to, and wore the flight suits and boots that DynCorp provided him with. (*Id.* at 22, 28, 35-36). West agreed to abstain from drinking and be subject to random drug tests by DynCorp. (*Id.* at 15-17). Although, the record does not disclose what type of work West performed for EAST pre-DynCorp, it is clear that West was not eradicating drugs in the mountains of Colombia. Clearly, the drug eradication program was a new work situation which West acquiesced to.

5. DynCorp Provided West with Tools and a Place for Performance

DynCorp provided West with tools and a place for performance. The spraying missions were conducted out of DynCorp's FOL. The aircraft piloted by West was maintained by DynCorp. DynCorp provided West with security, housing, transportation to and from Larandia, flight suits, boots, bunks and other equipment necessary for the missions. (D.E. 242 at 17, 22, 28, 35). Thus, the District Court correctly determined that this factor favored DynCorp.

6. New Employment Over a Considerable Length of Time

The District Court found that the amount of time West participated in the drug eradication program was sufficient to favor borrowed servant. The court noted that this factor was concerned with situations where an employee is hired as a trainee for a few days. (D.E. at 49-50). Here, West was not a new employee, he was involved in the program for a sufficient length of time to satisfy this factor.

Because the overwhelming majority of the *Ruiz* factors, as supported by the evidence, favored the application of the borrowed servant doctrine, the District Court correctly determined that West was DynCorp's borrowed servant. This decision was affirmed by the Eleventh Circuit and was plainly correct under established legal precedent.

CONCLUSION

The Court should deny West's Petition for a Writ of Certiorari because there are no compelling reasons to grant such a writ in this case. The decisions of the trial court and the Eleventh Circuit Court of Appeals are based upon a proper application of the longstanding borrowed servant doctrine. All issues raised by West in his Petition for a Writ of Certiorari have been previously addressed by and properly disposed of by the lower courts. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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